

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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(3)

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

428

NO. 20,088

CENTRAL BROADCASTING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 13 1966

NO. 20,306

Nathan J. Paulson
CLERK

CENTRAL BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
THE UNITED STATES OF AMERICA,
Respondents.

APPEAL FROM A DECISION AND MEMORANDUM
OPINIONS AND ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

(i)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of

CENTRAL BROADCASTING COMPANY (SCGC)
Belmont, North Carolina

Has: 1270kc, 500w, 1kw-LS, DA-N, U

Requests: 1270kc, 500w, 5kw-LS, DA-N, U, Class III

For Construction Permit

Docket No.
15105
File No.
BP-15138

[54]

[Rec'd June 18, 1963]

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D.C. on the 12th day of June, 1963;

The Commission having under consideration the above-captioned and described application;

IT APPEARING, That, except as indicated by the issues specified below, the applicant is legally, technically, financially, and otherwise qualified to construct and operate as proposed; and

IT FURTHER APPEARING, That the following matters are to be considered in connection with the aforementioned issues specified below:

1. The proposal would cause objectionable interference to the existing operations of Stations WHEO, Stuart, Virginia and WSAT, Salisbury, North Carolina.

2. a) The applicant, Central Broadcasting Company, owns 51% of the stock of Burke County Broadcasting Company, licensee of Station WSVM, Valdese, North Carolina and a like amount of the stock of Concord-Kannapolis Broadcasting Company, licensee of Station WEGO, Concord, North Carolina. Concord-Kannapolis, in turn, holds 32% of the stock of the licensee of Station WPCC, Clinton, South Carolina and 51% of the licensee of WZKY, Albemarle, North Carolina. The above stock is voted by Robert R. Hilker, president and 26% stockholder of the applicant.
3. b) Belmont (the proposal) and Concord, North Carolina, location of Station WEGO, are approximately 28 miles apart. At present, there exists an overlap of their respective normally protected service areas (0.5 mv/m contours). The overlap would be substantially increased in the event of a grant of the subject application.

Due to the proximity of Belmont and Concord, North Carolina, it will be necessary to determine in the hearing ordered below whether a grant of the application would be in contravention of Section 3.35(a) of the Commission's Rules. Stations WSVM, WZKY and WPCC are located approximately 44, 50, and 72 miles,

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respectively, from Belmont. Although there would be no overlap between the aforementioned stations and the instant proposal, a substantial question exists regarding the geographical concentration of the broadcast interests of the applicant within a radius of 72 miles of Belmont, North Carolina. Accordingly, in considering the proposal and Section 3.35 of the Rules, it appears appropriate to

consider the size, extent and location of the areas served and to be served, the extent of the overlap involved; the number of persons residing within the overlap area; the classes of stations involved; the extent of other competitive service to the areas in question; the extent to which the stations will rely on the same revenue and program sources; the nature of the programming that the stations will present with particular reference to the needs of the communities they are designated to serve; the advertising practices of the stations; the source of program material and talent for each station; and such other facts as will tend to demonstrate that the overlap and/or concentration of control involved will or will not be in contravention of Section 3.35 of the Commission's Rules.

IT FURTHER APPEARING, That, in view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below:

IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WCGC and the availability of other primary service to such areas and populations.
2. To determine whether the proposal of Central Broadcasting Company would cause objectionable interference to Stations WHEO, Stuart, Virginia, and WSAT, Salisbury, North Carolina, or any other existing standard broadcast stations, and, if so, the

nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

3. To determine whether a grant of the proposal of Central Broadcasting Company would be in contravention of the provisions of Section 3.35(a) of the Commission Rules with respect to multiple ownership of standard broadcast stations.
4. To determine whether a grant of the proposal of Central Broadcasting Company would be in contravention of Section 3.35(b) of the Commission Rules with respect to concentration of control.

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5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

IT IS FURTHER ORDERED, That, Patrick Henry Broadcasting Corporation and Mid-Carolina Broadcasting Company, licensees of Stations WHEO and WSAT, respectively, ARE MADE PARTIES to the proceeding.

IT IS FURTHER ORDERED, That, in the event of a grant of the instant application, the construction permit shall contain the following conditions:

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 3.87 of the Commission Rules are not extended to this authorization, and such operation is precluded.

Permittee shall submit new common point impedance measurements and sufficient field intensity measurement data to show clearly that the installation and ad-

justment of any new components required, as a result of daytime power increase, has not adversely affected the operation of the nighttime directional array.

Permittee shall submit sufficient field intensity measurement data to establish that the radiation has been reduced to essentially 175 mv/m/kw as proposed.

Permittee shall submit with the application for license antenna resistance measurements made in accordance with Section 3.54 of the Commission Rules.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and parties respondent herein, pursuant to Section 1.140 of the Commission Rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.362(b) of the Commission's Rules, give notice of the hearing, within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.362(h) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: June 17, 1963

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[Rec'd. May 13, 1964]

Appearances

Frank Fletcher and Henry Goldstein (Spearman & Roberson) on behalf of Central Broadcasting Company (WCGC); Harrell Powell, Jr. (White & Crumpler) on behalf of Mid-Carolina Broadcasting Company (WSAT); and Larry M. Berkow on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

**INITIAL DECISION OF HEARING
EXAMINER SOL SCHILDHAUSE**

PRELIMINARY STATEMENT

1. This matter is here on an application by Central Broadcasting Company for authority to increase power from 1,000 watts to 5,000 watts for the daytime, non-directional operation of its station WCGC in Belmont, North Carolina. WCGC now operates unlimited time on the regional frequency 1270 kc, and would continue without change its directionalized nighttime operation with power of 500 watts. By order released June 17, 1963 (FCC 63-552), the Commission designated the application for hearing on the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WCGC and the availability of other primary service to such areas and populations.
2. To determine whether the proposal of Central Broadcasting Company would cause objectionable interference to Stations WHEO, Stuart, Virginia, and WSAT, Salisbury, North Carolina, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

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3. To determine whether a grant of the proposal of Central Broadcasting Company would be in contravention of the provisions of Section 3.35(a) of the Commission Rules with respect to multiple ownership of standard broadcast stations.
4. To determine whether a grant of the proposal of Central Broadcasting Company would be in contravention of Section 3.35(b) of the Commission Rules with respect to concentration of control.
5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

The licensees of stations WSAT and of WHEO were made parties to the proceeding. The latter withdrew before the taking of evidence got under way. All parties participated in a prehearing conference held on July 18, 1963; hearing sessions for the taking of evidence were held November 12 and 13, 1963, at the conclusion of which the record was closed.

FINDINGS OF FACT

COVERAGE ISSUE

2. Belmont, a community of 5,007 persons, is located 12 miles east of Charlotte, North Carolina. Two neighboring towns, North Belmont and South Belmont, have populations of 8,328 and 2,286, respectively. Gaston County in which Belmont is located has 127,074 persons and its county seat, Gastonia, 8 miles west of Belmont, has a population of 37,276. Station WCGC is the only standard broadcast station in Belmont, but there are three other stations in Gaston County - WLTC Gastonia, WGAS South Gastonia, and WCSL Cherryville.

3. The present and proposed daytime primary service areas of

WCGC are roughly circular in shape and centered on Belmont. Although WCGC serves most of Gaston County, its 0.5 mv/m contour falls short of the county's northwest corner by 7 miles. In Mecklenburg County, which borders Gaston County on the east, the existing coverage of WCGC reaches rural districts as far as 10 miles beyond the center of Charlotte (which is about 12 miles from Belmont) and only 5 miles short of the extreme eastern border of Mecklenburg County. About one-third of both Lincoln County (N.C.) and York County (S.C.) also lie within the WCGC 0.5 mv/m contour. Operating as proposed, WCGC would expand its service area outward in all directions by increments ranging from 7 miles in the west to 10 miles in the east. The station would place a 2 mv/m or greater signal over all of Charlotte, would achieve complete coverage of Gaston and Mecklenburg Counties, attain 75 to 80 percent coverage of both Lincoln and York Counties, and penetrate minor portions of six counties - Catawba, Iredell, Cabarrus, Union, and Cleveland in North Carolina, and Cherokee County in South Carolina.

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4. Charlotte has a population of 209,551. WCGC now provides primary service to an estimated 64,961 of the Charlotte population. With the proposed improvement of daytime facilities, and the inclusion of all of Charlotte within the 2 mv/m contour, the population gain in that city alone would be 144,590. The area within the 2.0 mv/m contour of station WCGC would be increased by 280 square miles from 349 to 629 square miles, or by 80.2 percent, and the population within the same contour would be increased from 162,406 to 358,157, or by 195,751 persons, representing an increase of 121 percent. Similarly, within the interference-free daytime 0.5 mv/m contour the area served would be increased from 1,204 to 2,391.5 square miles, or by 1187.5 square miles, representing an increase of 98.6 percent, and the population

within such contour would be increased from 246,763 to 491,106, or by 244,343 persons, representing an increase of 99.9 percent. The population gained by WCGC in cities with population in excess of 2,500 would be 146,690. Most of this gain - or 144,590, as indicated - would be in the City of Charlotte which has eight AM stations located there. The remaining 2,100 population gain would be in Clover, South Carolina, a city of 3,500 which does not have its own broadcast facility but which receives service from three other stations. Approximately 20% of WCGC's present daytime primary service area lies in the neighboring state of South Carolina to the south, and in the case of the proposed operation the figure would be on the order of 25%. With respect to the gain area only, about one-third would lie in South Carolina.

5. Two stations, WBT and WSOC in Charlotte, cover the entire area proposed to be gained by WCGC through the increase of daytime power from 1 to 5 kw, and one other station at Charlotte serves between 75 to 100% of the proposed WCGC gain area. Two stations, one at Charlotte and the other at Gastonia, serve from 50 to 75% of the area. Within portions of the area proposed to be gained, signals are received from 14 stations in 25 - 50% of the area, and from 22 stations within 0 to 25% of the gain area.

INTERFERENCE ISSUE

6. The increase in power by station WCGC would cause interference to station WHEO, Stuart, Virginia, and to station WSAT, Salisbury, North Carolina.

7. Station WHEO, a co-channel, daytime station operating with power of 1 kilowatt, has a population of 42,128 in an area of 1030 square miles encompassed by its normally protected 0.5 mv/m contour. But existing interference precludes service from WHEO to 2,404 persons (5.7%) in an area of 44.8 square miles (4.35%). Interference that would be generated by a power increase for WCGC would adversely affect an additional 2,564 persons in an area of 39.1 square miles within the 0.5

mv/m contour of WHEO. The new interference would represent 6.5% of the population within the WHEO interference-free contour. The total of existing and prospective interference would affect 83.9 square miles and 4,968 persons, these representing 8.15% and 11.8% of the total area and population, respectively,

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within the normally protected 0.5 mv/m contour of WHEO. Within the area served by WHEO which would be adversely affected by the operation of WCGC with increased power, most of the population is located in the State of North Carolina and less than two square miles of the interference area are in the State of Virginia. Two stations provide service to the entire area now served by WHEO which would be subjected to additional interference from WCGC. Within the WHEO interference area, a minimum of 3 and a maximum of 10 other services are available.

8. Station WSAT, operating daytime only on adjacent channel 1280 kc with a power of 1 kilowatt, embraces within its 0.5 mv/m contour an area of 1530 square miles with a population of 135,503. Interference is currently received by WSAT from another station within an area of 55.7 square miles with a population of 2,338. This loss represents 3.64% of the area and 1.73% of the population within the 0.5 mv/m contour of WSAT. Thus, the present interference-free service area of WSAT embraces 1474 square miles with a population of 133,165. With the increase of power by WCGC, additional interference would be caused within the WSAT service area affecting less than 2,000 persons and thus reducing the population within the WSAT interference-free contour to some 131,000 people. WSAT would therefore have a combined loss from all interference of some 5% of area and 3% of population within its normally protected 0.5 mv/m contour. There is a minimum of 10 and a maximum of 14 other services available to the area likely to be lost to WSAT from the proposed operation of WCGC.

MULTIPLE OWNERSHIP ISSUES

Overlap of Ownership

9. The issues on multiple ownership and on concentration of ownership are concerned with the circumstance that stations WCGC, WEGO, WZKY, WSVM, and WPCC are under some degree of common ownership. The facilities of these stations are as follows:

WCGC, Belmont, N. C.	1270 kc, 500 w. 1 kw-LS, U, Class III
WEGO, Concord, N. C.	1410 kc, 1 kw, D, Class III
WZKY, Albemarle, N.C.	1580 kc, 250 w, D, Class III
WSVM, Valdese, N.C.	1490 kc, 250 w, 1 kw-LS, U, Class IV
WPCC, Clinton, S.C.	1410 kc, 1 kw, D, Class III

The applicant herein, Central Broadcasting Company, licensee of station WCGC in Belmont, owns 51% of the stock of Burke County Broadcasting Company, licensee of station WSVM in Valdese. The applicant also owns 51% of the stock of Concord-Kannapolis Broadcasting Company, licensee of station WEGO, Concord. The latter, in turn, holds 32% of the stock of Radio Station WPCC, Inc., licensee of station WPCC in Clinton. Concord-Kannapolis also owns 51% of the stock of Radio Station WZKY, Inc., licensee of station WZKY, Albemarle.

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10. The capital stock of each of the five affiliated corporations is widely distributed, with Central Broadcasting Company, WCGC, Belmont, having 19 stockholders, 5 officers, and 10 directors; Concord-Kannapolis Broadcasting Company, WEGO, Concord, having 51 stockholders, 5 officers, and 13 directors; Radio Station WPCC, Inc., station WPCC, Clinton, 4 stockholders, 4 officers and directors; Radio Station WZKY, Inc., station WZKY, Albemarle, 40 stockholders, 4 officers, and 11 directors; and Burke County Broadcasting Company, WSVM, Valdese, 61 stockholders, 5 officers, and 11 directors. But Robert R. Hilker and James B. Keel, the only full-time professional

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broadcasters among the principal owners, determine the policies, and manage, direct, and supervise the overall affairs of all five of these stations. Hilker owns none of the stock of Radio Station WPCC, Inc., owns 1% of Concord-Kannapolis Broadcasting Company, 0.8% of the stock of Radio Station WZKY, Inc., and about 1.6% of Burke County Broadcasting Company. He is, however, President, a director, and the largest single stockholder with 26% of Central Broadcasting Company, is President and a director of three of the four other licensee companies, Secretary-Treasurer of the fifth, and is authorized to vote WCGC's stock in WSVM and WEGO and WEGO's stock in WPCC and WZKY. Keel is Executive Vice President, a director, and owner of 3.3% of WCGC stock. He has an option, however, to purchase an additional 25% of the stock of Central Broadcasting which he anticipates acting upon in the very near future. Mr. Hilker and Mr. Keel, moreover, have entered into a buy-sell agreement whereby neither could sell his stock without first offering it for sale to the other. Hilker is general manager of WCGC, Keel of WEGO. The latter is also in charge of regional sales for all five stations.

Overlap of Signal

11. The 5-station combination was assembled as follows: WCGC and WSVM were built in 1954 and 1961, respectively; the others were acquired by purchase, WEGO in 1957, WPCC in 1958, and WZKY in 1960. With respect to Belmont, Valdese (WSVM) lies about 45 miles to the northwest, Concord (WEGO) 28 miles northeast, Albemarle (WZKY) 48 miles east northeast, and Clinton (WPCC) 72 miles southwest. The service area of WCGC occupies a roughly central location with respect to the service areas of the other stations. None of the five affiliated stations provides coverage with present or proposed facilities over the city in which any other station of the group is located. Neither is there any overlap, with either present or proposed facilities, of the 2.0 mv/m contours of any of the five stations in the group. Over-

lap of the 0.5 mv/m contours does exist between WCGC and WEGO and between WEGO and WZKY. The overlap between WCGC and WEGO would be increased by the operation of WCGC with 5 kw power, as proposed.

12. Belmont (WCGC) and Concord (WEGO) are approximately 20 miles apart. With present facilities, the 0.5 mv/m daytime contours of WCGC at Belmont and WEGO at Concord overlap within an area of 267 square miles. Although Charlotte is located in the approximate center of the overlap area, only 32,431 persons within the overlap area are considered to be served by both stations. At the closest point, the

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0.5 mv/m contour of WEGO lies about 8 miles from Belmont, the 0.5 mv/m contour of WCGC about 10 miles from Concord. The current WCGC-WEGO overlap area is served in its entirety by 8 other stations. A minimum of 12 and as many as 16 other services are available within any portion of the present overlap area. With the proposed increase of daytime power by WCGC, the WCGC-WEGO overlap area would be increased to 608 square miles and the overlap population to 56,100. The 0.5 mv/m contour of WCGC would by about 2 miles not extend as far as Concord; the same contour of WEGO would remain about 8 miles short of Belmont. The 2.0 mv/m contour of WCGC, operating as proposed, would not approach closer than 15 miles to Concord and the same contour of WEGO would, likewise, fall 15 miles short of Belmont. The common service with existing WCGC represents 19.8% of the population and 19.6% of the area served by WEGO, and 13.1% of the population and 27.2% of the area served by WCGC. Should WCGC's proposal be granted, the enlarged overlap would represent 33.4% of the population and 43.2% of the area served by WEGO, and 11.4% of the population and 24.9% of the area that would be served by WCGC. Within the area of overlap of 0.5 mv/m contours, other services would be

available from 5 stations serving the entire area. A minimum of 9 and as many as 16 other services would be available within any portion of the overlap area. WCGC offers a network radio service; WEGO is an independent station.

Regional Concentration

13. The area and population within the present interference-free service area of each of the five affiliated stations are as follows:

<u>Station</u>	<u>Square Miles</u>	<u>Population</u>
WCGC	1,204	246,763
WEGO	1,365	163,421
WZKY	654	44,300
WSVM	471	72,975
WPCC	1,440	74,729

14. WEGO has affiliate WEGO-FM in Concord. One other AM station (WABZ) and one FM station (WABZ-FM) are located in Albemarle. Apart from these and the five AM stations which are part of the Central Broadcasting combination, no other broadcast station is located in any of the five communities. Within the service areas of the five stations, however, other stations are located as follows:

Within the 0.5 mv/m contour (as proposed) of WCGC

Gastonia, N. C. - two AM, one FM
 South Gastonia, N.C. - one AM
 Dallas, N.C. - one AM
 Kings Mountain, N.C. - one AM
 Lincolnton, N.C. - one AM
 Charlotte, N.C. - eight AM, four FM, three TV
 Rock Hill, S.C. - two AM
 York, S.C. - one AM

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Within the 0.5 mv/m contour of WEGO

Kannapolis, N.C. - two AM, one FM
Mooresville, N.C. - one AM
Salisbury, N.C. - two AM, one FM
Charlotte, N.C. - eight AM, four FM, three TV

Within the 0.5 mv/m contour of WSVM

Morganton, N.C. - one AM, one FM
Lenoir, N.C. - one AM
Hickory, N.C. - three AM, two FM
Granite Falls, N.C. - one AM

Within the 0.5 mv/m contour of WPCC

Laurens, S.C. - one AM, one FM
Newberry, S.C. - one AM

Within the 0.5 mv/m contour of WZKY

One other AM and one FM, both in
Albemarle, as indicated.

15. The communities where the five affiliated stations are located may for decisional purposes usefully be described as follows: Belmont - As indicated in par. 2, above, this city of about 5,000 persons is located some 12 miles east of Charlotte. The principal economic activity appears to be textile manufacturing; there is regular rail, bus, and truck service available; the Charlotte airport is only 6 miles away. A joint city and county public school system operates through the high school level. Other educational institutions in the Belmont area include Belmont Abbey, a four-year college for men, Sacred Heart Junior College, a junior college for women, and North Carolina Vocational Textile School. The city also has its own public library. The Belmont Banner, the local newspaper, is published weekly on Wednesday. The Charlotte Observer, the Charlotte News, and the Gastonia Gazette are daily papers circulating in the Belmont

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area. Television reception is available from stations in Charlotte, Asheville, Spartanburg, and Winston-Salem. Western Union maintains an office in Belmont. Telephone service is provided on a toll-free basis to ten cities and towns, including Charlotte, Gastonia, Cramerton, Lowell, Dallas, Mt. Holly, McAdenville, Stanley, and Pineville. Concord - This city, located about 18 miles northeast of Charlotte, has a population of 17,799, is the seat of Cabarrus County which has a population of 68,137. Concord appears to be a substantial manufacturing center, maintains its own school system, has its own hospital. The Concord Daily Tribune is published daily except Saturday, has circulation of 9,964 daily, 10,111 on Sundays. Valdese - This city of 2,941 persons in Burke County is some 45 miles northwest of Belmont and Charlotte. It is 7 miles east of Morganton which is the seat of Burke County. Morganton has a

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population of 9,186, Burke County 52,701. Valdese is noted for its hosiery manufacture. The town has a public library, has available to it public school education through high school, is located about 15 miles from Lenoir-Rhyne College. Weekly newspaper service is offered by the Valdese News and daily coverage is rendered by its associated paper, the News-Herald, published in nearby Morganton. Additionally, there appears to be some circulation of daily newspapers from Hickory, Charlotte, Greensboro, and Asheville. Clinton - This city in Laurens County, S.C., is 32 miles south of Spartanburg, S.C. and about 72 miles southwest of Belmont. Clinton has 7,937 persons, Laurens County 47,609. The economy of Clinton is both industrial (principally textile and apparel manufacturing) and agricultural (cattle, dairy, products, poultry, etc.) The city has its own public school system through high school. Presbyterian College is located in Clinton. Albemarle - This city of 12,261 is 35 miles east by northeast of Charlotte and 20 miles

east of Concord. Albemarle is the seat of Stanly County which has 40,873 persons. Stanly County is bordered on the west by Cabarrus County where, as indicated, WEGO is operated in Concord. The Albemarle economy is built principally around manufacturing. The city has its own public school system through high school. The co-educational, liberal arts Pfeiffer College is located in Stanly County. Albemarle has regular rail and bus service, also has a commercial airport. The city has available to it the Stanly County News and Press, a semi-weekly newspaper with a circulation of about 8,500.

16. In addition to existing overlap between WCGC and WEGO which would be increased by grant of the subject WCGC application, all as recited in par. 12 above, there is also an existing overlap between stations WEGO in Concord and WZKY in Albemarle, the extent of which would be unaffected by grant of the WCGC application. There is no overlap of the 2.0 mv/m contours of WEGO and WZKY, but the 0.5 mv/m contours do overlap, the common area containing 236.8 square miles and 14,747 persons. These represent about 33% of the population and 36% of the area served by WZKY, and about 9% of the population and 17% of the area served by WEGO. Within the overlap area, other services are available from a minimum of 6 stations which serve the entire overlap area and from as many as 14 stations in some portions.

17. The five stations in the group operate under a written set of policies and procedures of which Messrs. Hilker and Keel are the arbiters. Under the general supervision of Hilker and Keel, each station has its own manager who is charged with day-to-day operational responsibility. But the managers operate within narrow discretionary limits. For example, advance approval is required for any contract obligating the station to any service or equipment in excess of \$100, for any changes in existing contracts, for rate changes, for broadcasting editorials, for running contests, and for changes in program balance proposed in an application to the Commission. Stations WCGC, WPCC, and WZKY are affiliated with the radio network of the Ameri-

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can Broadcasting Company and WCGC also has an affiliation with Mutual Broadcasting System. None of the five affiliated stations has a national sales

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representative, and no national sales representative represents the group with the exception that Keystone Broadcasting System, which operates a transcription network, does make some national sales for some of the affiliated stations. The arrangements with Keystone are, however, handled by the stations involved under individual contracts with the Keystone transcription service. Keel, as indicated above in par. 10, represents the five stations in soliciting regional advertising. All five of the affiliated stations are offered to potential sponsors as a package, but very few sales are made on that basis. Also offered are combinations of several stations in the group. Occasional sales are made of combinations of stations WEGO, WZKY, and WCGC. Although a special combination rate card is published, the discounts are negligible where applicable and are in some cases oddly higher than the aggregate of the published rates for the individual stations.

18. The bulk of the revenues of each of the five affiliated stations is of course obtained from local advertising, with only small amounts of local and national business represented. None of the stations solicits local business in any of the cities where the other stations in the group are located. There is some joint purchasing of supplies and promotional items for the stations. All the stations in the group use the same consulting engineer, the same accounting and communications law firms. The financial records for the five affiliated stations are maintained by a certified public accountant located in Gastonia, North Carolina. The accounts receivable ledger of each station is, however, kept by the individual station. Each station does its own billing and pays its own bills. All the stations use the Associated Press news service, but each station has its individual contract with AP.

19. An analysis of the content of the programming presented by the affiliated stations during a composite week, as shown in their 1963 renewal applications, is as follows:

	WCGC Belmont	WEGO Concord	WZKY Albe- marle	WPCC Clinton	WSVM Valdese
	%	%	%	%	%
Enter- tainment	54.9	64.2	70.5	67.1	65.9
Religious	16.3	17.9	14.1	12.4	15.4
Agricul- tural	0.2	1.2	0.7	.8	0.6
Educa- tional	4.3	.0	.0	.0	1.2
News	13.5	10.6	10.2	12.8	9.8
Discus- sion	0.7	0.4	.0	0.5	.0
Talks	10.1	5.7	4.5	6.4	7.1

An analysis of the same program schedules for the five affiliated stations with respect to source of program origination is as follows:

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	WCGC Belmont %	WEGO Concord %	WZKY Albemarle %	WPCC Clinton %	WSVM Valdese %
Network Commercial	26.4	0	14.2	7.9	0
Network Sustaining	1.8	0	.6	1.9	0
Recorded Commercial	45.6	64.7	58.8	58.8	50.8
Recorded Sustaining	6.3	6.4	5.9	8.9	25.9
Wire Commercial	0.9	9.0	.9	6.2	7.8
Wire Sustaining	1.3	5.4	4.6	1.3	2.6
Live Commercial	14.2	10.5	11.2	3.4	9.3
Live Sustaining	3.5	4.0	3.8	11.8	3.6
Total Commercial	87.1	84.2	85.1	76.3	67.9
Total Sustaining	12.9	15.8	14.9	23.7	32.1
Hours Weekly	136.5	89.75	86.5	90.5	124
Spot Announcements	1481	1563	619	919	1082
NonCommercial Spot Announcements	186	223	113	229	436

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20. WCGC operates about twenty hours a day. Monday through Friday, the station carries about three hours daily of ABC network fare. On Saturdays and Sundays, about six hours a day is given over to ABC network shows. The network programs of Mutual Broadcasting System presented by WCGC consist primarily of newscasts. The station carries one to one and one-half hours of Mutual presentations daily. A principal reason for the requested increase in power is to increase WCGC coverage over Charlotte. ABC does not have an affiliate located in Charlotte. The network considers WCGC its outlet for that city. The station's promotional announcements indicate that it is serving Charlotte as an ABC affiliate. WCGC holds itself out as more of a sports station than most stations in Charlotte. Ten percent of the station's local programming and about twenty percent of its advertising revenue comes from Charlotte and these would be expected to increase with an increase in power as proposed. The program schedule of WCGC appears daily in one of Charlotte's two daily newspapers.

CONCLUSIONS

1. With its proposed improvement of facilities, station WCGC would be enabled to provide primary service daytime to a substantially larger area and to considerably more people than are now served by the station. The area and population would be nearly doubled by the addition of some 1187 square miles and 244,343 persons within the 0.5 mv/m interference-free contour. Closer inspection reveals, however, that the gains are of people and in places situated in areas where there is a considerable amount of existing service. The population gain, for example, would be chiefly in the City of Charlotte which now has eight AM stations of its own. And, compounding these circumstances is the consideration that, apart from a general representation that the station

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does a bigger job of covering sports, the record does not contain probative support for the proposition that WCGC will offer anything particularly vital to, or needed by those who would pick up improved or new signal from grant of the power increase.

2. If this were all, a grant would nevertheless be rationally admissible. Since frequency space is in short supply, getting the maximum use out of existing facilities is undoubtedly worthwhile. But the matter is overlaid with the questions raised by the issues on which the hearing has been held.

3. On multiple ownership, the record clearly compels the judgment that the five stations here involved are under common control. Even with stock ownership diffused among companies and people, and in the presence of the complicated interrelationship between the corporate licensees, the direction of station operations does and will continue to lie with Messrs. Hilker and Keel. Appraising the public risk in granting a daytime power increase here, it is helpful to note that only in this proceeding and at this stage in the development of the WCGC cluster of broadcast holdings has the Commission raised the prospect of calling a halt to the further build-up of the group's broadcast influence in this part of the country. Under the circumstances, the applicant should be disfavored only if the increased overlap between WCGC and WEGO is of disqualifying proportion or if the prospective power increase for WCGC may be said to give the group an alarming increase in regional strength. From a weighing of the evidence there emerges the reasonable judgment on those counts that since the first five acquisitions were acceptable to the Commission, the foreseeable result of a power increase for the Belmont station is not enough suddenly to shift the balance against the group.

4. On overlap, 32,431 persons are currently considered to be receiving service from both WCGC and WEGO. A power increase for

WCGC would enlarge the overlap area to include 56,100 people. Although these figures are said to demonstrate an increase from some 20% to about 33% ^{*/} in the proportion of overlap population to total population in the WEGO service area, there would conversely be a decline from approximately 13% to about 11% in the same ratio with respect to the new service area of WCGC. Neither station would place a signal of 0.5 mv/m or greater over the principal city of the other, and by considerably wider margins would the 2 mv/m contours of the stations fall short of each other's community. Significantly, Charlotte is situated close to the center of the overlap area and has eight standard broadcast stations in addition to local FM and TV service. Generally throughout the overlap area, there is an abundance of competing service with a minimum of nine and as many as sixteen other services available to any portion. It is not likely,

^{*/} The same figure of 33% in the case of WEGO and WZKY (see par. 16, above) describes the existing and unobjectionable ratio of overlap population to total population served by WZKY at Albemarle.

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against this background, that the existing diversity of broadcast influence in the overlap area will be critically jeopardized by a power increase, as requested, and its attendant enlargement of the existing overlap area between WCGC and WEGO.

5. In the presence of the Commission's established judgment that the existing common ownership situation is acceptable, the entire record, but more particularly the descriptions of the existing coverage of the five affiliated stations (see par. 13, above), the population and other services in the areas to be gained (pars. 2, et seq.), the communities where the stations operate (par. 15), the other services available to the overlap areas (pars. 12, 16), and the other stations located within the

service areas of the stations in the group (par. 14) amply support a conclusion favorable to the applicant on whether the power increase for WCGC would decisively tip the scales on the questions built into the regional concentration of holdings. With all five stations under common control, there is some combination conduct. For example, there is some bulk buying of supplies, there is central accounting, and all stations use the same engineering firm and communications counsel. But these incidents of common ownership hold no serious public threat and may reasonably be held to have been expectable when the five stations were being acquired by the group. The use of a combination rate card appears to merit closer inspection. But combination rates are generally of use in attracting regional and national sponsors, and the evidence is that there is little of that business available to the stations. This too is expectable from the likelihood that these stations, apart possibly from WCGC which is near Charlotte, are small situations in small communities and not calculated to attract combination buying by larger accounts. This may account for the seemingly haphazard manner in which the joint rate card is drawn. That such a card has been drawn up may be taken more as a sign perhaps of hope than of any significant threat of unfair competition to other stations competing for regional and national business.

6. There remains the matter of prospective interference to stations WHEO and WSAT. On this close question, the attraction of the big edge of prospective gains over likely losses must not obscure the abiding purpose of the Commission's rule (73.24(b)) which would require under the circumstances that relative needs be gauged. Balancing the equally pressing wisdoms of (a) encouraging the larger use of facilities and (b) the durable concept in Commission lore of the normally protected contour, fairness requires, in the absence of a specific showing that there is a genuine need for the extension of service by WCGC, that protection be extended to small market stations WHEO and

(341-342, 412)

WSAT against the countervailing desire of WCGC to improve its position in the abundantly served Charlotte market.

7. The judgment is in the applicant's favor on the multiple ownership questions, against it on the very close question of whether the public interest will accommodate the prospective interference to existing stations. Accordingly, IT IS ORDERED, This 7th day of May, 1964, that unless an appeal from this Initial Decision is taken by a party or

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the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Central Broadcasting Company for a construction permit to increase daytime power (File No. BP-15138) IS DENIED.

/s/ Sol Schildhause
Hearing Examiner
Federal Communications Commission

Released: May 11, 1964
and effective 50 days thereafter
subject to the provisions of the
Rule [1.276] cited in the ordering
clause above. Exceptions, if any,
must be filed within 30 days of the
release date unless an extension is
duly granted.

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MEMORANDUM OPINION AND ORDER

By the Review Board:

1. The petitioner, Central Broadcasting Company (WCGC) requests that the record in this proceeding be reopened and remanded to the Examiner to receive new engineering evidence. 1/

2. By Order (FCC 63-552), released June 17, 1963, the Commission designated the WCGC application for an increase in power of Class III Station WCGC, Belmont, North Carolina, from 1 kw to 5 kw, daytime, non-directional, on 1270 kc for hearing on issues seeking to determine (a) areas and populations expected to gain or lose service; (b) objectionable interference to be caused to WHEO, Stuart, Virginia and WSAT, Salisbury, North Carolina; (c) whether a grant would be in contravention of Section 73.35(a) and/or (b) formerly Section 3.35(a) and (b) of the Rules. Hearings were held on November 11 and 12, 1963. The licensees of Stations WHEO and WSAT were made parties to the proceeding. In an Initial Decision (FCC 64D-33) released May 11, 1964, Hearing Examiner Sol Schildhouse recommended denial of the application, resolving (c) supra, in favor of the applicant, but concluded as to (b), supra, that WCGC failed to show that the need for its proposed new service outweighed the need for the service to be lost by reason of the interference to be sustained by WHEO and WSAT. The Examiner predicated his conclusion on the fact that WCGC failed to show that the need for the new service outweighs the need for the service to be lost by virtue of the interference to be caused. Exceptions were filed on August 10, and 31, 1964, and oral argument requested.

3. WCGC now seeks to reopen the record to permit a substitution of engineering data. WCGC's engineering exhibit submitted by it and used during the course of the hearing established, in part on the

1/ Before the Board for consideration: (1) Petition to reopen the record by Central Broadcasting Company filed on October 14, 1964; (2) Broadcast Bureau's comments filed on October 23, 1964; and (3) Reply of Central Broadcasting Company, filed on November 4, 1964.

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basis of proof-of-performance measurements, and in part on the soil conductivity map, that its proposed operation would cause interference to 2,564 persons (6.5%) in WHEO's normally protected 0.5 mv/m contour; that since WHEO now receives interference from existing WPMP affecting 2,404 persons (5.7%), a total of 4,968 persons (11.8%) would be affected; that an additional 2,000 persons within the 0.5 mv/m contour of adjacent channel Station WSAT would likewise lose the service of that station resulting in a total loss to WSAT to approximately 4,400 persons (3%). The interference figures submitted in the proffered exhibit are based on the field intensity measurements and establish that WHEO receives no interference from WPMP and that the interference from the proposed operation would affect only 6.66% of the population and 4.3% of the area within WHEO's normally protected contour. WCGC urges that since the Examiner termed the interference issue a "close question", this new data showing a lesser degree of interference to existing WHEO is decisively significant.

4. In support of its allegation that good cause exists for the requested action, WCGC alleges that it did not learn of the exact interference problem which would be caused by its proposed operation to Station WHEO "until the eve of the hearing"; that it did not submit the actual measurements based on the field intensity at that time because its consulting engineer (who it is alleged was engaged only shortly before the hearing) was unable because of professional commitments, to immediately devote the time necessary to conduct the actual measurements; that at the first opportunity the measurements were made and submitted.

5. The extraordinary action of remanding a case and reopening the record will not be taken unless the petitioner demonstrates that it has good cause for waiting until the record was closed before proffering the new evidence, and that there are unusual and compelling cir-

cumstances warranting such action. See Veterans Broadcasting Company, Inc., FCC 63-525, 25 RR 520 (1963); Rockland Broadcasting Company, FCC 63R-402, 25 RR 893 (1963); Mitchell Broadcasting Company, FCC 64R-2, 1 RR 2d 771 (1964). WCGC made no such showings. WCGC moved for the instant relief on October 14, 1964, one year and four months after the inception of the proceeding. The designation order included the requirement that a determination be made as to whether objectionable interference would be caused by the proposal to WHEO and WSAT. During the course of the hearing WCGC elected to make the requisite showing on the basis of the Commission's soil conductivity map (Tr. 227). Thereafter, all of the positions assumed by WCGC were based on such showings. It was not until after the Examiner indicated in the Initial Decision that the interference showing posed a "close question" that WCGC re-examined the situation and proffered the amendment. The information now being offered is not newly discovered

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evidence, but rather, evidence easily discoverable initially, and only in retrospect found crucial. See Guinan v. FCC, 297 F.2d 782, 22 RR 2026 (1961).

6. In view of the applicant's failure to make an adequate showing of good cause for the lateness of its request, its instant petition will be denied. The position of the petitioner herein is similar to that of the applicant in Guinan v. FCC, *supra*, in which the Court of Appeals affirmed the Commission's refusal to give the applicant a second opportunity to offer evidence "easily discoverable initially, and apparently only now deemed crucial by appellant when seen from the highlands of hindsight." The circumstances before us are different from those involved in Dixie Radio, Inc., FCC 62-1196, 24 RR 666 (1962), in which the Commission remanded the proceeding to the Hearing Examiner

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to permit the introduction of measurement data. In Dixie, unlike here, the applicant had sought to introduce such evidence during the course of the evidentiary hearing preceding the Initial Decision, but was not permitted to do so. In the case before us, not until after the Initial Decision did the applicant first seek permission to introduce such measurement data. Thus, Central's application was designated for hearing on June 17, 1963. After the exchange of hearing exhibits on October 15, 1963, Central was informed by the Broadcast Bureau that its engineering showing was deficient in that it failed to disclose that Stations WHEO and WSAT, which would receive interference from Central's proposed operation, already received interference from other stations. On November 13, 1963, the requested showing was submitted by Central and the hearing record was closed. Proposed findings of fact were filed on January 17, 1964; the Examiner's Initial Decision was released on May 11, 1964; and Exceptions thereto were filed on August 10 and 31, 1964. As noted above, the instant petition to reopen the record was filed on October 14, 1964. In view of the foregoing chronological listing of dates, Central's assertion (Reply, para. 2) that its consulting engineer was "retained shortly before the application was designated for hearing" and needed time to study the issues and prepare exhibits, rather than constituting good cause, emphasizes the dilatoriness by Central in allowing over a year and four months to pass before filing its petition to reopen the record.

In view of the foregoing, IT IS ORDERED, This 23rd day of December, 1964, That the petition to reopen the record and remand the proceeding filed on October 14, 1964, by Central Broadcasting Company (WCGC), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: December 23, 1964

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ORDER

By the Review Board:

The Review Board having before it for consideration a petition for reconsideration of Review Board action denying the petition to reopen the record, filed on January 21, 1965, by Central Broadcasting Company (WCGC), and an opposition filed on January 26, 1965, by the Broadcast Bureau;

IT APPEARING, That Sections 1.102(b)(2) and 1.106(a) of the Commission's Rules provide, among other things, that petitions for reconsideration of interlocutory rulings of the Review Board will not be entertained, and the petition for reconsideration will therefore be denied;

IT FURTHER APPEARING, That petitioner's alternative request to argue the merits of its petition for reconsideration at the time of oral argument on the exceptions to the Initial Decision is rendered moot by the denial of its petition for reconsideration;

ACCORDINGLY, IT IS ORDERED, This 27th day of January, 1965, That the Petition for Reconsideration, filed January 21, 1965, by Central Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: January 28, 1965

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Appearances

Frank Fletcher and Henry Goldstein (Spearman & Roberson) on behalf of Central Broadcasting Company (WCGC); Harrell Powell, Jr. (White & Crumpler) on behalf of Mid-Carolina Broadcasting Company

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(WSAT); and Larry M. Berkow on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

By the Review Board: Berkemeyer, Nelson and Pincock.

1. Central Broadcasting Company (WCGC), seeks a construction permit to increase the power of Class III standard broadcast station WCGC, Belmont, North Carolina, from 1 kw to 5 kw power, non-directional operation during daytime hours, and continue its directionalized nighttime operation of 500 watts power on its presently licensed frequency of 1270 kc. The issues specified in the designation Order released June 17, 1963 (FCC 63-552), sought determination of: (a) areas and populations expected to gain and lose primary service, and availability of other primary service to the areas and populations; (b) nature and extent of interference, if any, to WHEO, Stuart, Virginia, and WSAT, Salisbury, North Carolina, or any other existing station; (c) whether a grant would be in contravention of Sections 73.35(a) and (b) [formerly Sections 3.35(a) and (b)] of the Rules, with respect to multiple ownership and concentration of control. Patrick Henry Broadcasting Corporation and Mid-Carolina Broadcasting Company, licensees of Stations WHEO and WSAT, respectively, were made parties to the proceeding.

2. In his Initial Decision released May 11, 1964 (FCC 64B-33), Hearing Examiner Sol Schildhouse recommended a denial of WCGC's application. He resolved the Section 73.35 issue in applicant's favor but found that there was an insufficient showing made to satisfy the requirements of Section 73.24(b). Exceptions were filed by WCGC seeking reversal of the ultimate decision. WSAT and the Commission's Broadcast Bureau filed exceptions in which they indicated their agreement with the final result

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but urged that in the event the Board was inclined to reverse the conclusion reached as to the Section 73.24 issue, it should also reverse the Examiner's ruling on the 73.35 issue. In accordance with the request, oral argument was held before a panel of the Review Board on February 2, 1965. The Rulings of the Review Board on the Exceptions are set forth in the Appendix. The Board is of the view that the Examiner's disposition of the multiple ownership issue is correct, but believes that the 73.24 issue should also be resolved in WCGC's favor and the application granted.

3. The salient facts on the 73.35 issue are set out in the Initial Decision. We have reviewed them in the light of the exceptions and agree with the Examiner's evaluation of them. The multiple ownership interrelationship is not of a disqualifying nature, and a grant would not result in a concentration of control inconsistent with the public interest, notwithstanding the diffusion of stock ownership among the companies and people and the overall management arrangement with Messrs. Hilker and Keel.^{1/} The Commission has by the grants previously made accepted this multiple ownership interrelationship, and there has been no demonstration that the increase in coverage now would seriously disturb the accepted balance. Nor has there been any showing that the group would be given any appreciable increase in regional strength.^{2/}

4. We turn now to the interference issue. As a basic premise, where objectionable interference will be caused to other stations, an authorization for an improvement in facilities of an existing station will be issued only after a satisfactory showing has been made that the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. The Examiner, in evaluating the showing made herein with respect to the prospective gains over the likely losses, recognized that the question was a close one, and concluded that there was not a sufficient showing of genuine need for

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the extension of service by WCGC to overcome the need for protection to be extended to the small market stations. The Board, after reviewing the record, finds that a contrary conclusion would be more in keeping with the Commission policy and that a grant of WCGC's application would in fact serve the public interest, convenience and necessity.

5. The proposed improvement of daytime facilities would provide an increase in the interference-free contour from 1,204 square miles to 2,384.6 square miles, or by 1,180.6 square miles, representing an increase of 98 percent, and the population receiving primary service would be increased from 246,763 persons to 489,390 persons, or by 242,627 persons,

1/ See Des Moines County Broadcasting Co., FCC 64R-424, 3 RR 2d 416.

2/ See findings 17 through 20 of the Initial Decision and paragraphs 3 through 5 of the conclusions.

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representing an increase of approximately 98.2 percent. This proposed operation would expand its urban coverage by providing primary service to all of the City of Charlotte, North Carolina, and would thus serve an additional 144,590 persons or 69% of Charlotte's total population of 209,551 persons. Also, Station WCGC, operating as proposed, would provide an additional primary service to 2,100 persons residing in the City of Clover, South Carolina, or 60 percent of its total population of 3,500 persons. Although there is a minimum of 8 services available to the community of Charlotte, the community of Clover, which has no broadcast facilities of its own, now receives service from only three stations. ^{3/}

6. WCGC's proposed operation would cause interference to two existing stations -- co-channel interference to Station WHEO, Stuart, Virginia, and adjacent-channel interference to WSAT, Salisbury, North

Carolina. ^{4/} At present, WHEO receives co-channel interference from WMPM in an area of 44.8 square miles with a population of 2,404 persons, or 4.35 percent of the area and 5.7 percent of the population. WCGC, operating as proposed, would cause additional co-channel interference to WHEO in an area of 39.1 square miles with a population of 2,564 persons, increasing the total interference to WHEO to 83 square miles with a population of 4,968 persons, or 8.15 percent of the area and 11.8 percent of the population. ^{5/} The area served by WHEO which would be adversely affected is a crescent-shaped strip which lies at the periphery of WHEO's service area, approximately 36 miles in length and 1-1/2 miles across at the widest point. The major portion of this crescent lies in North Carolina, with less than a two square mile triangle in the uppermost portion lying in the State of Virginia. At its closest point in the State of North Carolina, the loss area extends from 16 to 17-1/2 miles from WHEO's transmitter. The loss area lies 105 miles from WCGC. A minimum of three and

^{3/} WCGC also points out that a grant to it will result in providing Charlotte with ABC network radio service daytime.

^{4/} Although WHEO was named a party to this proceeding in the designation Order, supra, and filed a notice of appearance on June 18, 1963, it withdrew from participation by its notice of withdrawal on October 30, 1963, and did not appear at any further time in the proceeding. The fact that WHEO decided not to pursue its private interests in this matter does not eliminate the Commission's obligation to protect the public interest. Cf. Newport Broadcasting Co., 24 FCC 19, 13 RR 236c (1958); WSTV, Inc., 31 FCC 694, 21 RR 575 (1961); Salem Broadcasting Company, 36 FCC 395, 2 RR 2d 64 (1964).

^{5/} Central's petition to reopen the record and have the proceedings remanded to the Examiner for new engineering evidence affecting the interference to WHEO was denied by the Review Board for failure to make an adequate showing of good cause for the lateness of the request. See Memorandum Opinion and Order released December 23, 1964 (FCC 64R-566).

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a maximum of ten other services would remain available in the entire interference area. The major portion of the interference area would continue to receive in excess of four services.

7. WSAT now receives adjacent-channel interference from another station in the area affecting 55.7 square miles of its service area with a population of 2,338 persons, or 3.64% of the area and 1.73% of the population. WCGC's proposed operation would cause an additional loss to approximately 2,000 persons, thus increasing the total loss to 5% of the area and 3% of the population within WSAT's normally protected contour. A minimum of 10 and a maximum of 14 other services are available in the WSAT loss-area.

8. From these facts, it is apparent that a substantial number of persons (242,627) will receive a new service; a small number of persons (2,564) will lose an existing service from Station WHEO and an even smaller number (2,338) will have WCGC's service substituted for that of WSAT. It is certainly true, as the Examiner reasons, that as a general proposition a station's normally protected contour is entitled to protection, and that small market stations should not be restricted in their service areas merely to provide another service in what is already a relatively well served urban area. However, like most such propositions, its applicability depends on the facts of the case, and in this instance the extent of the loss to WHEO and WSAT is a pertinent factor in the ultimate evaluation. Both the actual number of persons and the percentage relationship of this number to the total number of persons residing within the station's normally protected contour are weighed in evaluating the loss which will result. ^{6/} Here, the percentage loss to WHEO would be 6.5% scarcely comparable to the 19% loss which the Commission refused to permit in WMAX, supra.

9. Two recent Board decisions bear on this problem; one led to a grant and the other to a denial. In Moberly Broadcasting Company,

37 FCC 1049 (1964), reconsid. denied FCC 65R-167, released May 7, 1965, the Board denied an application which would have brought a new daytime service to 66,255 persons and a first primary service nighttime to about 1,200 persons because interference received by four stations would be increased 2.1%, 11.6%, 7.7% and 3.6%, raising the total percentages received by such stations to 45.6%, 62.2%, 28.7% and 34.0%, respectively, even though numerous other services were available in each of the interference areas. On the other hand, in S & S Broadcasting Co., 37 FCC 812 (1964), the Board granted an application that would bring a new primary service to over

6/ WMAX, Inc., 29 FCC 706, 19 RR 1086a (1960), reconsid. denied 30 FCC 104, 19 RR 1091, aff'd sub nom. Atlas Broadcasting Co. v. FCC, 295 F.2d 183, 22 RR 2013 (1961).

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950,000 people in the Chicago area, all parts of which received a minimum of ten primary services. Co-channel interference of less than 1% would have been caused to two stations and adjacent channel interference of less than 1% to three stations.

10. The interference to be caused by WCGC is substantially less severe than would have been caused by the applicant in Moberly and the number of people who would receive a new service is much greater. WCGC will cause more interference to WHEO and WSAT than S&S was expected to cause to any of the several stations with which it was involved and WCGC will provide a new service to a smaller population than S&S. While the area of interference to WHEO lies along the periphery of the primary service area, this area is much closer to WHEO (16-17-1/2 miles) than to WCGC (105 miles). In both Moberly and S&S the interference areas were fairly well served and the WHEO interference area is moderately well served. These comparisons make it plain that this case stands somewhere between S&S and Moberly on the interference question.

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11. If the only interference to WHEO were that to be caused by WCGC, WHEO would suffer interference slightly in excess of 6% of the persons within its normally protected primary service contour. This is a significant loss, but since the interference area is not underserved and since a large number of people would achieve a new service from WCGC, it alone would not require a denial. However, when the existing and proposed interference to WHEO are combined, WHEO will suffer a loss of 11.8% and the issue becomes more difficult to resolve. As may be inferred from the Board's decision in Moberly, there is a point, depending on the facts of each case, where, because of its cumulative effect, the creation of additional interference to a station cannot be accepted, absent compelling countervailing facts. In Moberly, the situation was aggravated by the fact that there would be severe cumulative effects on four stations. Here, however, the cumulative effect cannot be said to be appreciable except as to WHEO, and as to WHEO it is much less severe than in Moberly, totaling as it does only slightly in excess of 11%. Considering this and the interference to WSAT against the favorable factors, i.e., a new reception service to 242,627 persons and a fourth service to 2,100 persons in the City of Clover which contribute to a far more efficient utilization of this Class III frequency, it is concluded that although this case is a very close one there is a sufficient favorable balance to warrant a grant. This conclusion is justified even though the increased service area is now well served and the interference area is close to WHEO, for the gains are so substantial that they must be afforded heavy weight in the balancing process. Since the very small additional loss to WSAT will be in an area where WCGC's service will be substituted, there is no appreciable adverse effect upon the listening public to be expected from this change. Therefore, WCGC's application will be granted.

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ACCORDINGLY, IT IS ORDERED, This 3rd day of June, 1965, That the application of Central Broadcasting Company, for a construction permit to increase the power of Station WCGC, Belmont, North Carolina, to 5 kilowatts, IS GRANTED, subject to the following conditions:

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission Rules are not extended to this authorization, and such operation is precluded.

Permittee shall submit new common point impedance measurements and sufficient field intensity measurement data to show clearly that the installation and adjustment of any new components required, as a result of daytime power increase, had not adversely affected the operation of the nighttime directional array.

Permittee shall submit sufficient field intensity measurement data to establish that the radiation has been reduced to essentially 175 mv/m/kw as proposed.

Permittee shall submit with the application for license antenna resistance measurements made in accordance with Section 73.54 of the Commission Rules.

/s/ Donald J. Berkemyer
Member, Review Board
Federal Communications Commission

Attachment

Released: June 4, 1965

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APPENDIXExceptions of Central Broadcasting Company

<u>Exception No.</u>	<u>Ruling</u>
1	<u>Granted.</u> Finding 2 of the Initial Decision is corrected to indicate that Belmont is "west" of Charlotte.
2,3,8,10, 11, 12, 13	<u>Granted</u> to the extent indicated in the decision.
4	<u>Denied.</u> Joint activity is relevant to a determination of the method of operation.
5	<u>Granted.</u> The second part of the first sentence in finding 18 is amended to read: "With only small amounts of regional and national business represented."
6	<u>Granted</u> to the extent indicated in the decision. Since no programming issue was included in this proceeding, WCGC was not required to make a showing with respect thereto.
7	<u>Denied.</u> See footnote 4 of the decision.
9	<u>Denied.</u> The facts support the Examiner's finding.
14	<u>Granted.</u> The sale of stock in Radio Station WPCC, Inc. is noted herein.

Exceptions of Mid-Carolina Broadcasting Company

1	<u>Denied</u> for the reasons set forth in the decision.
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Exceptions of Broadcast Bureau

1,2,3,4,7, 8,9	<u>Granted.</u> Findings 4 and 12, and Conclusion 4 of the Initial Decision are amended in accordance with the Bureau's Exceptions and these changes are reflected in the decision.
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Exception No.	Ruling
5	<u>Granted</u> . The requested information is added to finding 12.
6	<u>Denied</u> for the reasons set forth in the decision.
10	<u>Denied</u> . The facts support the position taken by the Examiner.
11	<u>Denied</u> . The Broadcast Bureau has not shown how the determination of the interference issue is relevant to the resolution of the multiple ownership issue.
12	<u>Denied</u> in light of the decision.
13	<u>Granted</u> to the extent reflected in the decision and <u>denied</u> in all other respects.

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Appearances

Frank Fletcher and Henry Goldstein (Spearman & Roberson) on behalf of Central Broadcasting Company (WCGC); Harrell Powell, Jr. (White & Crumpler) on behalf of Mid-Carolina Broadcasting Company (WSAT); and Larry M. Berkow on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

By the Commission: Chairman Henry not participating.

1. The Commission has under considerations: (a) Initial Decision of Hearing Examiner Sol Schildhause (38 FCC 1205; 5 RR 2d 410), released May 11, 1964; (b) Review Board Decision (38 FCC 1199; 5 RR 2d 403), released June 4, 1965; (c) Order (FCC 65-836), released September 24, 1965; (d) Brief ^{1/} of Mid-Carolina Broadcasting Company (licensee of

(521-522)

Station WSAT, Salisbury, North Carolina), filed October 25, 1965; (e) Brief of Chief, Broadcast Bureau, filed November 1, 1965; (f) Reply Brief of Central Broadcasting Company (licensee of Station WCGC, Belmont, North Carolina, applicant herein); and (g) Transcript of Oral Argument held on December 9, 1965.

2. Two main questions were presented in this proceeding which may be briefly stated. First, the applicant, which has some degree of common ownership and control with three ^{2/} other standard broadcast stations, the farthest of which is 48 miles distant and all of which lie in North Carolina, sought an increase in power, and Mid-Carolina Broadcasting Company and the Broadcast Bureau contended that the Commission's policy against excessive multiple-ownership and undue concentration of control would be violated by the proposal. This issue was resolved in favor of the applicant by both the Hearing Examiner and the Review Board. Since we have decided to deny the application on other grounds, we need not consider further this conclusion.

1/ Styled "Brief in Support of Exceptions."

2/ A fourth station was considered by the Hearing Examiner. It was subsequently severed from the interlocking complex, and the Review Board noted this fact.

[522]

3. Second, while the proposal will furnish considerable additional service to areas and populations delineated in the Hearing Examiner's Initial Decision, it will cause serious co-channel interference to WHEO Stuart, Virginia, and some adjacent channel interference to WSAT, Salisbury, North Carolina. Specifically, 242,627 persons would gain a primary service, of whom 144,590 residing in Charlotte, North Carolina, receive 8 other services, while 2,100 persons in Clover, South Carolina, receive 3 services. The remainder (about 96,000 persons) receive a minimum of 3 services. Thus, while the gained service is

significant, it would not reach any persons who are presently underserved. While the area lost to WHEO contains only 2,564 persons who are now served by from 3 to 10 other services, the more significant fact is that WHEO, which already receives interference from other stations to 5.7% of the population within its normally protected contour, would receive an additional 6.1% interference from the subject proposal. The cumulative interference to WHEO of 11.8% would result in the service of that operation's being reduced to an unsatisfactory degree. ^{3/} After carefully balancing the gains versus losses of service pursuant to the provisions of 47 CFR 73.24(b), we are persuaded that the serious erosion of service of an existing station (WHEO), plus additional interference to WSAT (1.47% for a total loss of 3.2%), outweighs the public benefit which would result from the new service. We are, therefore, in general agreement with the rationale of the Hearing Examiner's Initial Decision and disagree with that of the Review Board's Decision. ^{4/}

ACCORDINGLY, IT IS ORDERED, This 22nd day of December, 1965, that the application of Central Broadcasting Company for a construction permit to increase daytime power (File No. BP-15138) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple

Secretary

Released: December 27, 1965

^{3/} If the situation were reversed, and if WHEO were applying for a new station which would receive interference to 11.8% of the population within its normally protected contour, the proposal would be deemed so inefficient that it would violate the Commission's "10% rule" (47 CFR 73.28(d)(3)).

^{4/} We adopt the factual determinations of the Initial Decision as modified by the Review Board's ruling on Central Broadcasting Com-

(522, 532)

pany's Exceptions 1, 2, 6, 7, 11-13, and Broadcast Bureau's Exceptions 1-5 and 7-9. We do not pass upon the correctness of the rulings on Central Broadcasting Company's Exceptions 3-5, 9 and 10, Mid-Carolina Broadcasting Company's Exception 1, or Broadcast Bureau's Exceptions 6, 10-13, the subject matter thereof not being essential to the decision of this case. We disagree with the Review Board's ruling on Central Exception 8 for the reasons stated above.

[532]

MEMORANDUM OPINION AND ORDER

By the Commission: Chairman Henry not participating.

1. The Commission has before it a petition of Central Broadcasting Company (Central) seeking reconsideration of our Decision herein, released December 27, 1965, 2 F.C.C. 2d 195, and related pleadings.^{1/} The Decision reversed a decision of the Review Board, 38 F.C.C. 1199, granting Central's application to increase daytime power of Station WCGC, Belmont, North Carolina, and denied the said application.

2. Central contends that the Commission should have taken into consideration certain engineering evidence which had been proffered with a petition to reopen the record filed with the Review Board on October 14, 1964. By a Memorandum Opinion and Order released December 23, 1964,^{2/} the Review Board denied the petition to reopen for failure to demonstrate good cause for the delinquency of its request. Central requests that we review and reverse the Review Board's ruling and either remand the proceeding for consideration of such evidence or reconsider our decision in the light of such evidence and grant its application.

3. Central did not refer to the Board ruling in its briefs to the Commission after we had granted review.^{3/} In any event, even if we were to assume that the applicant has preserved its right to seek review, we believe that the reasons advanced by the Review Board for denial of the petition clearly support the action taken.

- 1/ Pleadings before us are: (a) a petition for reconsideration filed January 10, 1966, by Central Broadcasting Company; (b) opposition filed January 24, 1966, by the Chief, Broadcast Bureau; and (c) opposition filed January 24, 1966, by Mid-Carolina Broadcasting Company (WSAT).
- 2/ FCC 64R-566, 4 Pike & Fischer, RR 2d 473.
- 3/ Since the matter of interference to WHEO was a major consideration in the appeal, Central might have urged upon the Commission the admissibility of its measurements. It was not precluded from this course by the fact that the Review Board had granted Central's application despite the Board's adverse ruling on the admissibility of these measurements.

[533]

4. By its petition to reopen, Central sought to substitute an engineering exhibit containing interference figures based on field intensity measurements for the engineering showing submitted at the hearing which was based partially on proof of performance data and partially on the Commission's soil conductivity map. This request was made approximately 16 months after the application had been designated for hearing and 4 months after the issuance of the Initial Decision. We believe that the Review Board properly refused to reopen the record. See Louis Adelman, 29 F.C.C. 1223, 18 Pike & Fisher RR 106a (1960), aff'd sub nom. Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 297 F.2d 782 (1961). Reconsideration will not be granted merely to provide an additional opportunity to present material which was continuously available in order to permit an applicant to make a better case for a grant. WNOW, Inc., 38 F.C.C. 471, 4 Pike & Fischer RR 2d 857 (1965); WEOK Broadcasting Corp., FCC 65-115, 4 Pike & Fischer RR 2d 503 (1965).

ACCORDINGLY, IT IS ORDERED, This 2nd day of March, 1966,

(533, 562)

That the petition for reconsideration filed January 10, 1966, by Central Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: March 4, 1966

[562]

MEMORANDUM OPINION AND ORDER

By the Commission:

1. The Commission has before it a petition of Central Broadcasting Company (Central), filed April 22, 1966, which requests the Commission to seek a remand of this proceeding from the United States Court of Appeals for the District of Columbia where an appeal (Case No. 20,008) is now pending from our Decision of December 27, 1965 (2 FCC 2d 195) and our Memorandum Opinion and Order of March 2, 1966 (2 FCC 2d 677) by which we denied an application by Central for a construction permit and refused to reconsider and reopen the record, respectively. Our refusal to reopen in effect affirmed an earlier ruling of the Commission's Review Board on December 23, 1964 (4 RR 2d 473).

2. This is the third attempt by Central to reopen the record (the purpose for which the currently sought remand is asked) in order to introduce contours based on field intensity measurements which, Central believes, would be more favorable to its application than the computed contours (based on Central's own evidence) used in the adjudicatory process. The Review Board denied the original attempt because of laches and we affirmed for the same reason. Nothing is presented in the instant petition other than an indication that the Department of Commerce considers the Commission's soil conductivity map to contain

inaccuracies. We point out, however, that since 1939, we have consistently warned all interested parties that the soil conductivity map is based on "general areas of reasonably uniform conductivity," that wide variations are possible, and that the map should not be used in lieu of accurate measurements when they are available. Notwithstanding this, Central's offer of measurement data was first made sixteen months after its application was designation for hearing and four months after the initial decision was issued. The measurements have already been twice rejected because of laches, and no reason has been advanced to warrant reversal of these earlier determinations. Thus, no useful purpose would be served by requesting the Court to enter an Order remanding the proceeding to the Commission for further consideration.

[563]

3. ACCORDINGLY, IT IS ORDERED, This 2nd day of June, 1966, that the above-described petition of Central Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: June 3, 1966

[Tr. 404]

* * *

[Mr. Fletcher]

Now one of the things we are particularly concerned with in WHEO, if that is the sole criterion which I think this case has boiled down to for possible grounds of denial, is this:

[Tr. 405]

Our showing in the record based upon the interference to WHEO was based on using the Commission's soil map. Unfortunately I think from the standpoint of being able to adequately present our case, I did not become aware of the significance of this particular situation or the existence of any until just on the eve of the hearing. After the hearing was over with and after the initial decision came out, we had measurements made on this station WMPM, which causes 5 per cent of interference, and those measurements show --

COMMISSIONER BARTLEY: After the hearing?

MR. FLETCHER: Yes, sir.

COMMISSIONER COX: Is it in the record now?

MR. FLETCHER: I am coming to that.

We petitioned to open the record to have these measurements accepted which if they had been accepted would have demonstrated that WMPM does not interfere with WHEO, which would make the end result our causing interference to WHEO of six per cent. The population and area of WHEO that would be affected by WPCC is practically all in the area of North Carolina.

COMMISSIONER BARTLEY: We can not pay any attention to that.

MR. FLETCHER: To which I didn't object. The location of interference areas in other States has been mentioned in some of the Commission's decision as a fact to take into considera-

[Tr. 406]

tion as to whether to accept it or not.

* * *

PREHEARING STIPULATION

I. The undersigned parties, by their counsel, agree and stipulate that the following issues are presented by the Notice of Appeal in the above-entitled case.

1. Whether the action of the Commission in refusing to reopen the record to receive in evidence field intensity measurement data was arbitrary, erroneous and illegal where the request to reopen was filed four months after the initial decision was rendered.
2. Whether the action of the Commission in relying on the theoretical values of Figure M-3 of the Commission's Rules and Regulations when groundwave field intensity measurements taken by the Appellant were available and proffered, was arbitrary, erroneous and illegal.
3. Whether the action of the Commission in applying Section 73.28(d)(3) of the Commission's Rules and Regulations (the 10% rule) with respect to interference received or to be received by an existing station in denying Appellant's application was arbitrary, erroneous and illegal.
4. Whether the action of the Commission was arbitrary, erroneous and illegal in denying Appellant's application which would have brought a new service to a large number of persons without receiving interference within its normally protected 0.5 mv/m contour and would have caused new and objectionable interference to two other stations both of which already received some interference according to the evidence of record.

II. The undersigned by stipulating and agreeing to these issues do not concede the correctness of any factual or legal premises which may be implicit in the formulation of the issues.

III. The counsel for the parties further stipulate and agree that the Joint Appendix will be filed simultaneously with the filing of the reply brief and, if no reply brief is filed, fifteen (15) days after the filing of the Appellee's brief. References to the record appearing in the briefs of the parties will be to the page numbers of the record as

certified to the Court. In the printing of the Joint Appendix there will be set forth, in addition to the consecutive numbering of the Joint Appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the brief.

IV. The cost of printing the Joint Appendix, including the material included upon the designation by the Appellee (F.C.C.) provided such designated material is relevant to the issues, will be borne by the Appellant.

May 3, 1966.

Respectfully submitted,

/s/ John H. Conlin

/s/ William Fishman
Counsel for Appellee

/s/ Richard Hildreth

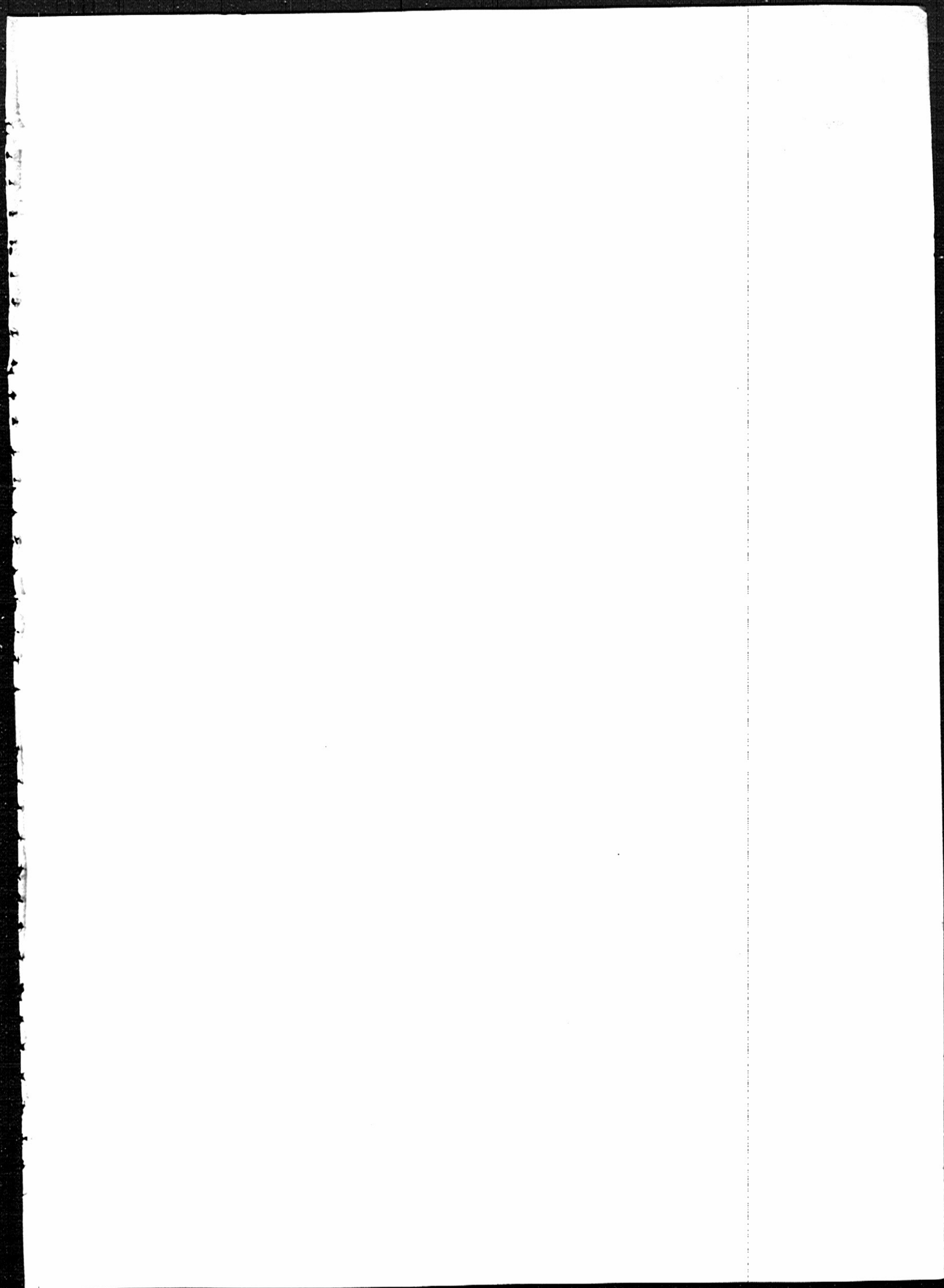
/s/ Marvin Rosenberg
Counsel for Appellant

[Filed May 12, 1966]

PREHEARING ORDER

Counsel for the parties in the above-entitled cases having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in these cases unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.



Binding Copy

BRIEF FOR APPELLANT-PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,088

CENTRAL BROADCASTING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

NO. 20,306

CENTRAL BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
THE UNITED STATES OF AMERICA,
Respondents.

**APPEAL FROM A DECISION AND MEMORANDUM
OPINIONS AND ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION**

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COMPANY**

(i)

STATEMENT OF QUESTIONS PRESENTED

The parties have agreed that this case raises the following questions:

1. Whether the action of the Commission in refusing to reopen the record to receive in evidence field intensity measurement data was arbitrary, erroneous and illegal where the request to reopen was filed four months after the Initial Decision was rendered.
2. Whether the action of the Commission in relying on the theoretical values of Figure M-3 of the Commission's Rules and Regulations when groundwave field intensity measurements taken by the Appellant were available and proffered, was arbitrary, erroneous and illegal.
3. Whether the action of the Commission in applying Section 73.28 (d) (3) of the Commission's Rules and Regulations (the 10% rule) with respect to interference received or to be received by an existing station in denying Appellant's application was arbitrary, erroneous and illegal.
4. Whether the action of the Commission was arbitrary, erroneous and illegal in denying Appellant's application which would have brought a new service to a large number of persons without receiving interference within its normally protected 0.5 mv/m contour and would have caused new and objectionable interference to two other stations both of which already received some interference according to the evidence of record.

In addition, and by virtue of the consolidation of Appellant's Petition To Review in Case No. 20,306 with Case No. 20,088, the subject matter of the said Petition To Review is also present in Issue 2 above.

(iii)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,088

CENTRAL BROADCASTING COMPANY,
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FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

NO. 20,306

CENTRAL BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
THE UNITED STATES OF AMERICA,
Respondents.

APPEAL FROM A DECISION AND MEMORANDUM
OPINIONS AND ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

JURISDICTIONAL STATEMENT

This case is an appeal from (1) a Decision of the Federal Communications Commission released December 27, 1965 (FCC 65-1159, 2 FCC 2d 195), 6 Pike & Fischer R.R.2d 699, which denied the application of Central Broadcasting Company to increase the power of Station WCGC from 1 kilowatt to 5 kilowatts, (2) from a *Memorandum Opinion*

and Order of the Federal Communications Commission, released March 4, 1966 (FCC 66-201, 2 FCC 2d 677), 7 Pike & Fischer R.R. 2d 140, which denied a Petition For Reconsideration filed by Central Broadcasting Company and which affirmed the action of the Commission's Review Board denying Central Broadcasting Company's Petition To Reopen the Record and accept into evidence certain measurement data (FCC 64R-566 ____ FCC 2d ____, 4 Pike & Fischer R.R. 2d 473) and (3) from a *Memorandum Opinion and Order* of the Federal Communications Commission released June 3, 1966 (FCC 66-482, 3 FCC 2d 884, 7 Pike & Fischer R.R. 2d 614) which denied Central Broadcasting Company's Petition To The Commission To Move The Court Of Appeals For An Order Remanding Proceeding.

The jurisdiction of this Court is invoked under Sections 402(a), 402(b)(1) and 402(c) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C.A. 402(a)(b)(c) (Supp. 1963) and Section 2 of the Judicial Review Act, 64 Stat. 1129, 5 U.S.C.A. 1032, and Rule 37 of the Rules of this Court.

STATEMENT OF THE CASE

Central Broadcasting Company (Central), the Appellant-Petitioner herein, filed on October 11, 1961, an application with the Federal Communications Commission for a construction permit to increase the power of Class III Standard Broadcast Station WCGC, Belmont, North Carolina, from 1 kilowatt to 5 kilowatts during its daytime hours of operation. The application was set for hearing by an Order released June 17, 1963 (FCC 63-552) on issues seeking a determination of (a) areas and populations expected to gain and lose primary service and the availability of other primary service to the areas and populations, (b) the nature and extent of interference, if any, to Station WHEO, Stuart, Virginia, and WSAT, Salisbury, North Carolina, or any other existing station, and (c) whether a grant would be in contravention of Section 73.35(a) and (b) of

the rules with respect to multiple ownership and concentration of control. (R. 54-56) Patrick Henry Broadcasting Corporation and Mid-Carolina Broadcasting Company, licensees of Stations WHEO and WSAT, respectively, were made parties to the proceeding. However, Patrick Henry Broadcasting Corporation withdrew as a party on October 30, 1963, prior to the hearing which was held on November 12 and November 13, 1963. (R. 78-80).

The Hearing Examiner issued an Initial Decision on May 11, 1964, finding no violation of the Commission's Rules under the multiple ownership and concentration of control issue, but on the "close question" of the prospective interference to Station WSAT and in particular, the cumulative interference to Station WHEO, as compared to the better use of facilities and the areas and populations to be gained by Station WCGC, he recommended that the application be denied. (R. 330-342). Central filed exceptions and a brief in support of exceptions with the Review Board on August 31, 1964.

With respect to the interference question, Central introduced evidence based in part on proof of performance measurements and in part on the Commission's soil conductivity map, showing that the proposed WCGC operation would cause co-channel interference to 2,564 persons (6.1%) in WHEO's normally protected 0.5 mv/m contour; that WHEO now receives interference from Station WMPM to the extent of 2,404 persons (5.7%), and that the total interference received by WHEO would therefore be 4,968 persons (11.8%). The exhibits also showed that there would be adjacent channel interference (substitution of service) to the extent of 2,000 persons caused to Station WSAT resulting in a total loss from all interference to WSAT of 4,400 persons (3%). The issues in the proceeding did not require an evidentiary showing as to the existing interference to Stations WHEO and WSAT. Therefore, the original Central exhibit prepared for introduction into evidence contained no

showing in this regard. (Central Ex. No. 9). (R. 182-222) However, a revised exhibit was offered into evidence which made a showing, based on the soil conductivity map, as to the existing interference to WHEO and WSAT. (Central Ex. No. 10). (R. 223-236). This revised exhibit was prepared by Central after an informal request by the Commission's Broadcast Bureau.

On October 14, 1964, Central Broadcasting Company filed a Petition To Reopen the Record to supply actual field intensity measurements in lieu of the engineering showing based on theoretical values of ground conductivity which had been used in connection with showing the amount of interference that would have been received by Station WHEO from Station WMPM. (R. 383-402). Those measurements demonstrated that, in fact, Station WHEO received absolutely no interference from Station WMPM. This petition was filed four months after the Examiner issued his Initial Decision and eight and one-half months before the Review Board's Decision in this case.

On December 23, 1964, the Review Board issued a *Memorandum Opinion and Order* (FCC 64R-566), denying the Petition To Reopen The Record on the basis that Central Broadcasting Company had failed to make an adequate showing of good cause for the lateness of its petition. (R. 412-414). It also denied on January 21, 1965, a petition requesting reconsideration of its order. (R. 426-429, 434). Subsequently, on June 3, 1965, the Review Board issued a Decision reversing the Examiner and granting the application of Central Broadcasting Company. The Review Board concluded that although the proposed operation of WCGC would cause interference to WHEO to the extent of 2,564 persons (6.1% of the population within the WHEO normally protected 0.5 mv/m contour), the interference area created was not underserved and was located, for the most part, in a different state (North Carolina) from where Station WHEO is located (Virginia). The Board also concluded that the interference to be caused by the proposed operation to Stations

WHEO and WSAT did not outweigh the fact that a new reception service would be provided to 242,627 persons and a fourth service to 2,100 persons in the City of Clover, South Carolina, resulting in a "far more efficient utilization of this Class III frequency." (R. 435-442).

Although both the licensee of Station WSAT and the Broadcast Bureau were parties to the proceeding, only the licensee of Station WSAT filed an "Application Requesting Review" of the Review Board's Decision. The Commission granted review and on December 9, 1965, heard oral argument. On December 27, 1965, it issued a Decision reversing the Review Board and denying Central's application on the basis that although the interference area lost to Station WHEO received service from 3 to 10 other stations, the "more significant fact" was that WHEO already received interference to 5.7% of the population within its normally protected contour and the additional 6.1% from the proposed operation of WCGC would result in WHEO's operation losing a total of 11.8% of its population. The Commission concluded that this "*cumulative*" interference of 11.8% which WHEO would suffer would reduce that station's service to an "unsatisfactory degree." As "legal" precedent for its conclusion, the Commission noted that if an application for a new station would receive interference to 11.8% of the population within its normally protected contour, "the proposal would be deemed so inefficient that it would violate the Commission's '10% rule' (47 CFR 73.28(d)(3))." The Commission made no mention of the fact that the existing and proposed interference area to WHEO was a crescent shaped sliver located on the outer extremity of WHEO's normally protected contour and at a distance of approximately seventeen miles from Stuart, Virginia (WHEO's home community), almost entirely in another state, North Carolina, and that the interference areas involved had sufficient other broadcast services available to them. Instead, solely on the basis of its "10% rule" rationale, the Commission, in a three paragraph, two page Decision, reversed its Review Board, and denied Appellant's ap-

plication. (R. 521-522). At the time this Decision was rendered, the Commission was aware that Central had taken field intensity measurements and proffered data based upon those measurements which showed in fact that Station WHEO would not suffer interference to more than 6.1% of the population within its normally protected contour as a result of a grant of appellant's application. (Tr. 405). No mention is made of this fact in the Commission's Decision.

On January 10, 1966, Central filed a "Petition For Reconsideration" requesting that the Commission reconsider its Decision in light of the measurement data which Central had been trying to get into the record and which demonstrated that Station WHEO did not receive interference from Station WMPM. (R. 523-527). That petition was denied by the Commission in a *Memorandum Opinion and Order* released March 4, 1966, on the grounds that Central's initial request for reopening the record to submit the measurement data was untimely and that the information had been continuously available and, therefore, no good cause existed to justify a reopening of the record. (R. 532-533).

Following the denial of the Petition For Reconsideration, Central timely filed a Notice of Appeal to this Court.

On April 22, 1966, Central filed a "Petition To The Commission To Move The Court of Appeals For An Order Remanding Proceeding" because of new information that had come to the attention of Central consisting of a letter which it had received from the Department of Commerce seeking engineering information in connection with a planned study of the Commission's soil conductivity map because the map had been found to be "in serious error." (The soil conductivity map was the basis for the determination of the interference in this case). (R. 536-544). The study by the Department of Commerce was being undertaken upon the request of the Chairman of the Federal Communications Commission made some time in October, 1965, or before the Commission's Decision reversing the Review Board. The Commission, in a *Memo-*

randum Opinion and Order released June 3, 1966, denied Central's petition on the basis that the Commission had recognized that its soil conductivity map was inaccurate as early as 1939 and that Central's offer of the measurement data (as opposed to the theoretical data based on the soil conductivity map) was untimely. (R. 562-563). Subsequently, Central filed with this Court a Petition For Review which was consolidated with this case upon Central's motion.

STATUTES AND RULES INVOLVED

Relevant portions of statutes and rules and regulations of the Federal Communications Commission are printed in the Appendix to this Brief.

STATEMENT OF POINTS

1. The Commission reliance on the theoretical values of the admittedly erroneous soil conductivity map in determining interference and its refusal to reopen the record to receive in evidence field intensity measurement data which would have shown the absence of interference, was arbitrary and unlawful.
2. The application by the Commission of the 10% rule criteria without prior notification that such a standard would be applied was arbitrary and unlawful.
3. The Commission's refusal to grant Central's application in light of its proposed efficient use of the frequency on the basis of a small amount of interference that would be received by two other stations, was arbitrary and unlawful.

SUMMARY OF ARGUMENT

1. The Commission reversed the Review Board and denied Central's application on the basis it would increase interference to persons within the normally protected contour of Station

WHEO from 5.7% to 11.8% (an increase of 6.1%) and also that some adjacent channel interference would be caused to Station WSAT. In so doing, the Commission refused to permit evidence in the form of field intensity measurements to be introduced which would have established that Station WHEO does not now receive interference and that the maximum amount of interference it would receive would be 6.1%. This refusal was based on the fact that the measurement data was offered four months after the Initial Decision had been released. In basing its refusal on the timeliness of the offer, the Commission ignored the fact that this was a single applicant proceeding and, therefore, time was not of the essence and further ignored the fact that it is the Commission's obligation and responsibility to determine facts and not rely on theoretical computations based on the soil conductivity map which it has admitted is in serious error.

2. In deciding this case, the Commission, for the first time and without prior notice, applied the concept of the 10% rule (Rule 73.28(d)(3)) to the interference that would have theoretically been received by Station WHEO. That rule, by its language and historically, has been applied only to applications for new stations and not to existing stations. If the Commission was going to apply the 10% standard to this case, then the applicant should have first been apprised of the fact by an issue or by some other appropriate method.
3. The Appellant's proposal would have resulted in a highly efficient use of a regional frequency both from the standpoint of technical efficiency and the improvement of service to those already receiving it as well as making the service available to a large number of persons. The small amount of interference that the proposal would cause in absolute numbers is insignifi-

cant in light of the positive gains and the improved efficiency. As was found by the Review Board, the proposed operation would result in an overall efficient use of frequencies and would otherwise be in the public interest. The reversal of the Review Board Decision was arbitrary and unlawful and contrary to established precedent and policy.

ARGUMENT

I

The Refusal To Consider Pertinent and Controlling Evidence

Central has presented to the Commission a proposal looking toward a substantial improvement in the facilities of Station WCGC and the bringing of its service to almost twice the area and twice the population than is now possible with its present facilities. Station WSAT would receive interference from the proposed operation of Station WCGC affecting 1.47% of the population within its normally protected contour, resulting in a total population loss to WSAT of 3.2% because of other existing interference. The "significant" loss, however, according to the Commission, was the 6.1% interference (2,564 persons) to be received by Station WHEO because that loss, when added to the supposedly already existing interference to WHEO from Station WMPM of 5.7% resulted in a total loss figure of 11.8%. This total figure, the Commission held, resulted in the service of Station WHEO being reduced to an unsatisfactory degree. However, if WHEO does not now receive any interference, then the maximum interference it would be receiving would be 6.1% which would obviously be well within tolerable limits, the Commission having thought WHEO a satisfactory operation when it supposedly received 5.7% interference. The difficulty is that the Commission arbitrarily refuses to permit the introduction of evidence that will establish that Station WHEO does not now receive any interference what-

ever and instead insists on blindly relying on its soil conductivity map (Figure M-3) which it has admitted is in "serious error." This, it is submitted, constitutes an abuse of discretion and results in the Commission Decision being based on admittedly erroneous evidence.

In this particular proceeding, time is not of the essence as might be the case in a comparative proceeding since Central was the only applicant in the case. No question exists as to bringing early service to the public or the delay in the granting of some competitive application.

This case is unlike that of *Guinan v. FCC*, 111 App. D.C. 371, 297 F.2d 782, 22 Pike & Fischer R.R. 2026 (1961) which involved two applicants in a comparative proceeding and in which the losing party there waited until after the Commission had issued its Decision before requesting reconsideration for the purpose of submitting measurements. In this particular case, interference studies based on the Commission's soil conductivity map were initially made by Central, but, under the issues as framed by the Commission, there was no need for determining the existing interference, if any, which was being received by Station WHEO or Station WSAT, and no such showing was made by Central in its original engineering exhibit which was admitted into evidence. Thus, from the very beginning of this case, neither Central nor apparently any other party, had any reason to believe that existing interference to other stations would be the crucial determining factor. Also, unlike the *Guinan* case, *supra*, there was no specific issue as to whether the interference would result in a violation of the 10% rule or a 10% criteria. Then too, Central's request to reopen the record was made some 8-1/2 months before the Review Board issued its Decision granting the Appellant's proposal, although it was made some 4 months after the release of the Examiner's Initial Decision. Thus, there are significant differences between this case and the *Guinan* case. More important, however, is the fact that the Commission, in the past, in the exercise of its sound discretion, reopened records to determine matters of importance

to a decision. For instance, it has reopened the record to inquire into character matters and has even gone so far as to permit further evidence to establish legal qualifications (*Mid-Island Radio, Inc.*, 6 Pike & Fischer R.R. 120(a) (1950)). It has reopened a case to permit an applicant, after an Initial Decision, to show that it would not sell time to time brokers and that all such contracts had been terminated (*Rhode Island Broadcasting Co.*, 6 Pike & Fischer R.R. 205 (1950)). A record was also reopened to permit substitution of ascertained figures for predicted ones. (*Lake Huron Broadcasting Co.*, 6 Pike & Fischer R.R. 875 (1950)). In a case where the soil conductivity map had been revised after the proceeding had commenced, the Commission held that there were compelling reasons why a further hearing had to be granted because the basis of the information available to the Commission showing interference, indicated that the Commission had no acceptable evidence before it upon which to base a determination (*Latrobe Broadcasters*, 10 Pike & Fischer R.R. 1038 (1954)). Where time was not of the essence, the Commission has permitted measurements to be submitted in a reopened proceeding (*Kansas Broadcasters, Inc.*, 23 Pike & Fischer R.R. 1112(a) (1963)).

There are two cases directly in point with the instant case wherein the Commission reached the exact opposite conclusion. In the case of *Airways, Inc.*, 6 Pike & Fischer R.R. 37(b) (1950), the Commission permitted the reopening of the record four months after the issuance of an Initial Decision so as to receive field intensity measurements rather than rely on soil conductivity data. The case of *Marmat Radio Co.*, 6 Pike & Fischer R.R. 51 (1950) was reopened by the Commission on its own motion after studies made by its engineers after the close of the record and after the issuance of an Initial Decision, disclosed that there was a higher conductivity in the area than that shown on the Commission's soil conductivity map. There the Commission said:

"Therefore, the evidence of record in this proceeding does not correctly reflect the service areas proposed

and the interference problems involved with respect to the applications. We conclude, therefore, that in view of these factors a further hearing must be held upon technical and engineering issues so that a proper determination can be made."

This position is in line with this Court's language in the case of *Enterprise Company v. FCC*, 97 U.S. App. D.C. 374, 231 F.2d 708 (1955), that the Commission in the exercise of its sound discretion, should reopen a record for reception of evidence for a complete consideration.

The question squarely presented therefore, is whether the Commission is abusing its discretion when it has before it facts which, if true, would require an exact opposite conclusion to a case. It is clear that administrative agencies have the duty to grant rehearings when the ends of justice have not been served (*N.L.R.B. v. Menaged*, 193 F. Supp. 135 (1961)). It can hardly be called the exercise of sound discretion when the Commission itself on past occasions has recognized the necessity of having accurate engineering and other information and itself has reopened records so as to obtain such information. Certainly, the logic of this position has not changed over the years and is equally applicable to the instant case as it was in previous cases. If there was going to be a delay occasioned to other applicants or a delay in bringing a new service to the public or the need for new issues or additional parties, then the question of timeliness could possibly be controlling. (*WEOK Broadcasting Corp.*, 4 Pike & Fischer R.R. 2d 503 (1965)). However, in this case, no such question exists. The only matter to be resolved is whether the public interest is going to be served and a proper resolution of that most important subject cannot be made unless it is based on all available facts. (*WNOW, Inc.*, 24 Pike & Fischer R.R. 787 (1962)). Had the Commission specified issues that would have called for information concerning existing interference to Station WHEO and Station WSAT, then Central could have taken steps to analyze the problem and make arrangements for the taking of measurements. However, as the

case developed, this was not possible at the time of the hearing and had to be done after the record was closed. Central, because of matters beyond its control, namely, the engagement of its consulting engineer with other commitments, encountered some delays in the taking of the field intensity measurements. Nevertheless, Central proceeded with due dispatch and submitted its field intensity measurements as soon as it could, without waiting for the Review Board Decision in this case. This was done so that the material would be before the Commission for a proper consideration of the facts of the case. Admittedly, it was not newly discovered evidence. However, the problem that was posed by the necessity of showing existing interference to Station WHEO was a new problem not specified in the issues and which had to be met by a new approach to the engineering material, namely, the taking of field intensity measurements. While administrative expertise is to be respected, this Court has made it quite clear that it is not to be blinded so as to exclude facts that can be established by proof in individual cases. (*W. S. Butterfield Theatres v. FCC*, 99 U.S. App. D.C. 71, 237 F.2d 552 (1956)).

There could be absolutely no harm to the public interest by the reopening of the record in this case to receive the field intensity measurements. In fact, the taking of a contrary position by the Commission is clearly not in the public interest since it deprives the Commission of facts upon which to base its Decision. Such a position is unreasonable, arbitrary and an abuse of discretion.

II

The Erroneous Application of the 10% Rule Standard

As set forth in the agreed statement of questions presented in this case, there exists a question as to whether the Commission erred in applying the 10% rule standard (73.28(d)(3)) which pertains to limitations on interference to be received by new proposals and not interfer-

ence to be received by existing stations. That rule states in pertinent part as follows:

73.28 Assignment of stations to channels. —

* * *

"(d) . . . Upon showing that a need exists, a class II, III, or IV station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour; provided: (1) no objectionable interference will be caused by the proposed station to existing stations or that if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference; and (2) primary service will be provided to the community in which the proposed station is to be located; and (3) the interference received does not affect more than 10 percent of the population in the proposed station's normally protected primary service area. . . "

In this case, the Commission, for the first time, made a determination that where an existing station will receive a total amount of interference in excess of 10% of the population within its normally protected contour, the operation of the existing station will be reduced to an unsatisfactory degree. This type of approach ignored prior precedent that established that where interference to be caused by an applicant is involved, Rule 73.24(b) applies. That Rule states as follows:

"73.24 Broadcast facilities; showing required. — An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

"(a) That the proposed assignment will tend to effect a fair, efficient, and equitable distribution of radio service among the several states and communities.

"(b) That objectionable interference will not be caused to existing stations or that if interference will be caused the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. That the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree. . . ."

The question to be resolved under Rule 73.24(b) with respect to interference being caused to another station is whether the need for the service to be gained outweighs the need for the service to be lost. The question of receiving interference to such an extent that a service would be reduced to an unsatisfactory degree only applies to a *proposed* service. Likewise, the 10% rule standard (73.28(d)(3)) has been determined to have no applicability in evaluating proposals insofar as interference to other stations was concerned (*International Radio, Inc.*, 2 R.R. 2d 103 (1963); Review denied FCC 64-525 released June 15, 1964). In this case, however, the Commission, for the first time, applied Rule 73.24(b) in such a fashion as to change its meaning by considering, insofar as a station receiving interference was concerned, not whether the need for service gained outweighed the need for service lost, but whether the service lost by an existing station as the result of a proposed operation reduced the *existing* station's operation to an unsatisfactory degree. The Commission here, further erroneously concluded, that this would be so, *per se*, if the total service lost by the existing station was in excess of 10% of the population contained within its normally protected contour.

At no time was there an issue in this proceeding which would indicate that the Commission would apply the 10% figure derived from the so-called 10% rule to this case. Heretofore, the question of 10% loss of service by an existing operation by reason of a proposal has not even been mentioned in cases, much less considered controlling. In all such cases, whether or not to grant an application depended on the facts of

the case and as was pointed out by the Review Board in granting Appellant's application, there were sufficient facts favoring the application to permit it to be granted under existing Commission precedent and policy. Thus, the reversal of the Review Board and the denial of the application, based on the application of the 10% rule standard was both improper and unfair to Central.

Had Central been forewarned by reason of an issue or some other indication that the 10% rule was to be applied, then its approach to the evidence presented in this proceeding would have been substantially different. The reason for this is that the Commission has established a number of cases in which the 10% rule standard has been waived. Hence, if Central had known that the Commission was going to consider a 10% interference figure as resulting in an unsatisfactory operation of Station WHEO, it could have been prepared to demonstrate that even if such was the case, reasons existed that would have permitted WHEO to be granted in spite of a 10% rule violation. For instance, in the case of *Greater Princeton Broadcasting Co.*, 22 Pike & Fischer R.R. 977 (1962) the Commission granted two waivers, one involving an 11.77% loss and the other a 13.91% loss. In the case of *North Central Video, Inc.*, 7 Pike & Fischer R.R.2d 619 (1966), the Commission permitted a 18.9% loss. The case of *WKYR, Inc.*, 3 Pike & Fischer R.R. 2d 1 (1964), involved a case where a third nighttime service would fail to serve 35.4% of the population within its normally protected countour. In other words, this case lies squarely within this Court's ruling in the case of *KGMO Radio-Television, Inc.*, 119 U.S. App. D.C. 1, 336 F.2d 920 (1964) where it was stated that where a party had no notice based on past Commission decisions or otherwise of a new requirement, then the case would be remanded to the Commission in order that the party might meet such a requirement.

No past Commission decisions have indicated that the 10% rule applied to a situation where an existing station would be receiving inter-

ference from a proposal. For instance, in the case of *Russell G. Salter, Inc.*, 19 Pike & Fischer R.R. 444 (1960), an application was granted despite the fact that it would increase interference to another station from 13.35% to 17.8% of the population within the other station's normally protected contour. More recently, in the case of *KPLT, Inc.*, 1 Pike & Fischer R.R. 2d 774 (1964), affirmed *per curiam sub nom O'Connor Broadcasting Corp. v. FCC*, Case No. 18944, U.S. App. D.C., 5 Pike & Fischer R. R. 209 (1965), the Commission granted a power increase of a station that would increase interference to another station from 7.9% to 13.3% and in which the increase in power would actually result in a net loss of existing service because of interference to other stations.

Thus, in the instant case, the Commission applied, without prior warning, the 10% rule which by its very terms, pertains only to applications and not to existing stations and that rule is based on percentages and not on population figures as such which was the information called for by the issues in this case. (*Thomas County Broadcasting Co.*, 1 Pike & Fischer R.R. 2d 376 (1963)). This is the first time the 10% rule has been so applied, or the 10% figure has been so applied, in a determination as to whether or not an application should or should not be granted because an existing station would receive interference from the proposal in excess of 10%. Central, having no notice because of prior Commission precedent or because of an issue in this proceeding, had no advance warning of the fact that such a factor would be applied in this case. It was, therefore, deprived of the right and the opportunity to respond in the hearing to such an issue or to present evidence to demonstrate that the 10% factor was either non-applicable or should be waived as is permitted in the case of applicants that are faced with a 10% rule problem. (*Deep South Broadcasting Co. v. FCC*, 120 U.S. App. D.C. 365, 347 F.2d 459, 4 Pike & Fischer R.R. 2d 2018 (1965)). Therefore, it was clear error for the Commission to apply the

10% rule to this case without giving the Appellant the opportunity to respond and to introduce evidence. (See *KGMO Radio - Television Co. v. FCC, supra.*)

III

The Proposal Would Result in an Efficient Use of the Frequency

The Commission, in denying the application of Central, permitted itself to be persuaded by the position it took with respect to the 10% rule rather than evaluating the proposal based on the facts of the case and without the imposition of new and arbitrary standards. It also permitted itself to be persuaded by the use of percentage figures on the one hand as compared with absolute figures on the other whereas, it should have treated this case on the basis of the issues which called for a determination of population and area to be gained or lost by reason of the proposal.

As pointed out by the Review Board in its Decision favoring a grant of Central's application, it would increase its service area from 1,204 square miles to 2,384 square miles or an increase of 1,180 square miles (an increase of 98%). The improvement in population reception would be an increase from 246,763 to 489,390 persons, an increase of 242,627 persons (98.2% increase). Urban coverage would be expanded by 144,590 persons and a fourth primary service to 2,100 persons residing in the city of Clover, South Carolina, would be made available. The proposal would also permit Central to provide the city of Charlotte with ABC radio network service during daytime hours. Thus, it is quite clear that what Central proposes is to make the most efficient use possible of a Class III frequency, and under the Communications Act, the question of efficiency is a principal factor to be considered in passing on applications. Given these facts, no reason exists to deny Central's

application for it proposed maximum power for its class of station and an increase of almost 100% in service. (*Thomas County Broadcasting Co., Inc., supra.*)

The application was denied, however, not on the basis that the proposal itself was *inefficient* (the contrary is obviously true), but rather on the alleged basis that it would result in the service of Station WHEO being reduced to an unsatisfactory degree because of the percentage of population lost to WHEO. Such a rationale, however, ignores the requirement of the Act that the Commission is to encourage the larger and more effective use of radio and not make the determination of efficiency, as also required by the Act, subject to misleading and erroneous conclusions through reliance on percentage figures rather than absolute figures (47 U.S.C. 151 *et seq.*, Sections 303(g) and 307(b)). Here, the Commission found that the fact that WHEO would lose some 2,564 persons within its normally protected contour should the Central application be granted. However, it lost perspective of the efficiency issue in this case by overemphasizing the *percentage* of total population (6.1%) which this obviously small number of persons represented. Clearly, the fact that some 2,564 persons would lose service is hardly a reason to deny a proposal which would bring a new service to some 242,627 persons. This is especially true where, as here, the small number of persons losing service have sufficient services available to them from other stations.

The significant factor in this proceeding, is not, as the Commission erroneously contends, the *relative* concept of percentages, but rather as clearly set forth in the issues the *absolute* concept of the *numbers* of *persons* and square miles which would gain or lose service as a result of the proposal. The only significance that percentages should have in such an analysis is in weighing the number of persons that would lose service against the number that would gain service. In that context, the number of persons which would gain service from Appellant's pro-

posal (242,627) is more than 100 times the number of persons that would lose service from WHEO (2,564) as a result of the proposed service.

If WHEO had been serving some 500,000 persons, the loss of 2,500 persons, percentage-wise, would have been insignificant. Thus, it is obvious that the significance results only from the use of percentages and not on an overall determination of the efficiency of the use of the frequency under the Commission's obligation to encourage the fuller use of radio and to make allocations based on an overall efficiency determination. The same logic should apply in both directions, because efficiency is a question of absolute standards and not just the particular party proposing the operation.

In any event, it is respectfully submitted that the Review Board's considered Decision, unfettered by an arbitrary application of the 10% rule was the proper decision in this case. The balancing of areas gained and lost as required by the issues of this case clearly favors a grant of Central's application. *S&S Broadcasting Co.*, 3 Pike & Fischer R.R. 2d 752 (1964). The public interest is the interest of the listening public in larger and more effective use of radio (*National Broadcasting Company v. U.S.*, 63 S. Ct. 997, 319 U.S. 190, 87 L.Ed. 1344 (1943)), and this interest cannot be served by denying some 242,627 persons a new service just because 2,564 persons will lose a service.

CONCLUSION

For the foregoing reasons, Central Broadcasting Company requests that the decision of the Commission released December 27, 1965, denying the application of Central Broadcasting Company to increase power and its *Memorandum Opinion and Order* released March 4, 1966, denying Central Broadcasting Company's Petition for Reconsideration, as

well as its *Memorandum Opinion and Order* released June 3, 1966, denying Central Broadcasting Company's Petition to Move the Court of Appeals for an Order Remanding Proceeding be reversed and the case remanded to the Commission for further proceedings according to law.

Respectfully submitted,

FRANK U. FLETCHER

RICHARD HILDRETH

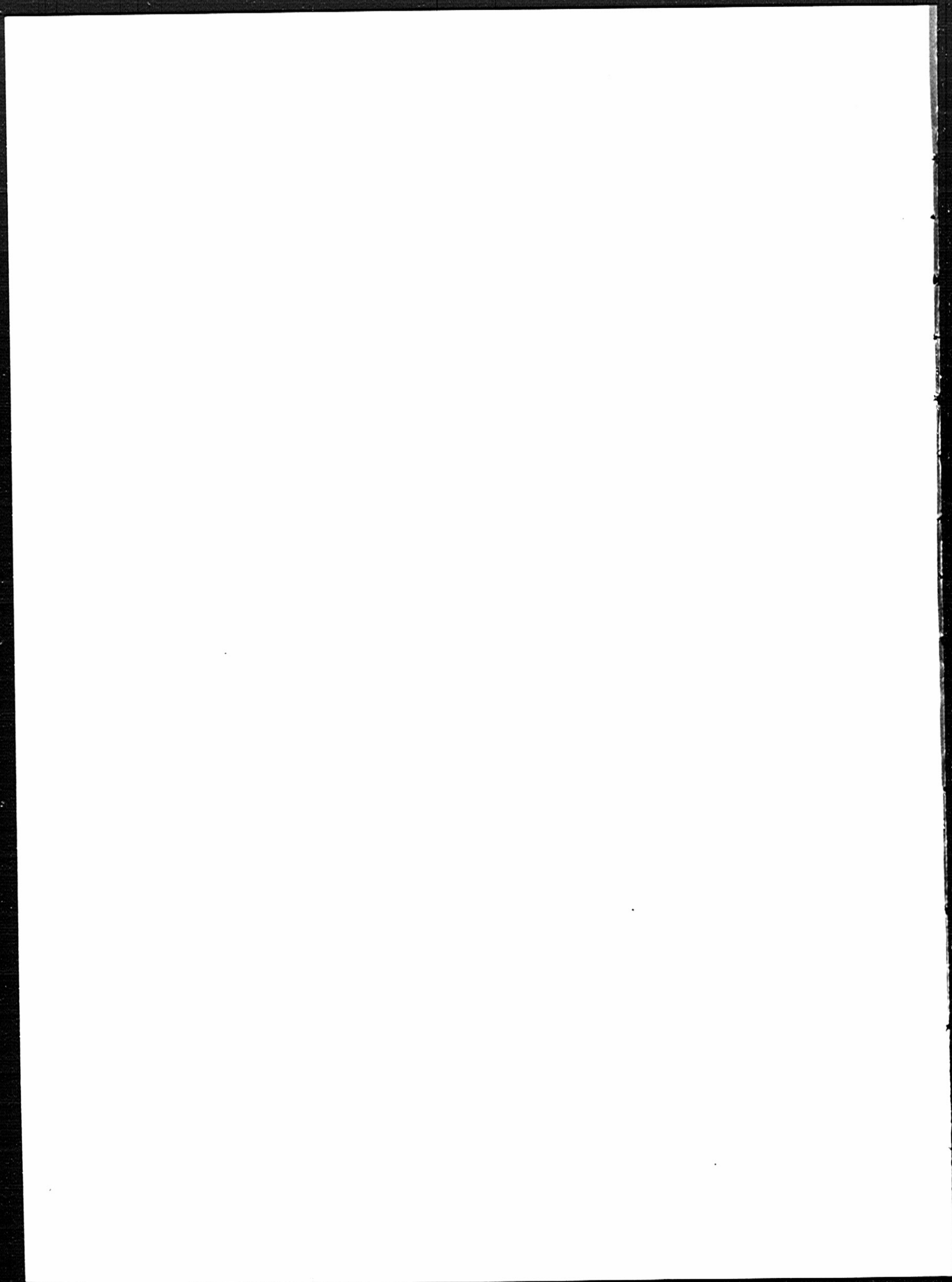
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August 29, 1966



APPENDIX

Communications Act of 1934, as amended,
47 U.S.C. 151 *et seq.*:

SEC. 303. Except as otherwise provided in this Act, the Commission, from time to time, as public convenience, interest or necessity requires shall . . .

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio and the public interest;

* * *

SEC. 307

* * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * *

Federal Communications Commission
Rules and Regulations

SEC. 3.22(c) (Now 73.21(b))

(c) Class III station: A 'class III station' is a station which operates on a regional channel and is designed to render service primarily to a metropolitan district and the rural area contiguous thereto. Class III stations are subdivided into two classes:

App. 2

(1) Class III-A station: A 'class III-A station' is a class III station which operates with power not less than 1 kilowatt nor more than 5 kilowatts, and the service area of which is subject to interference in accordance with § 3.182.

(2) Class III-B station: A 'class III-B station' is a class III station which operates with a power not less than 0.5 kilowatt and not more than 1 kilowatt night and 5 kilowatts daytime, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

* * *

SEC. 3.24(a) and (b) (Now 73.24)

SEC. 73.24 Broadcasting facilities; showing required. — An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

(a) That the proposed assignment will tend to effect a fair, efficient, and equitable distribution of radio service among the several states and communities.

(b) That objectional interference will not be caused to existing stations or that if interference will be caused the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. That the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree . . .

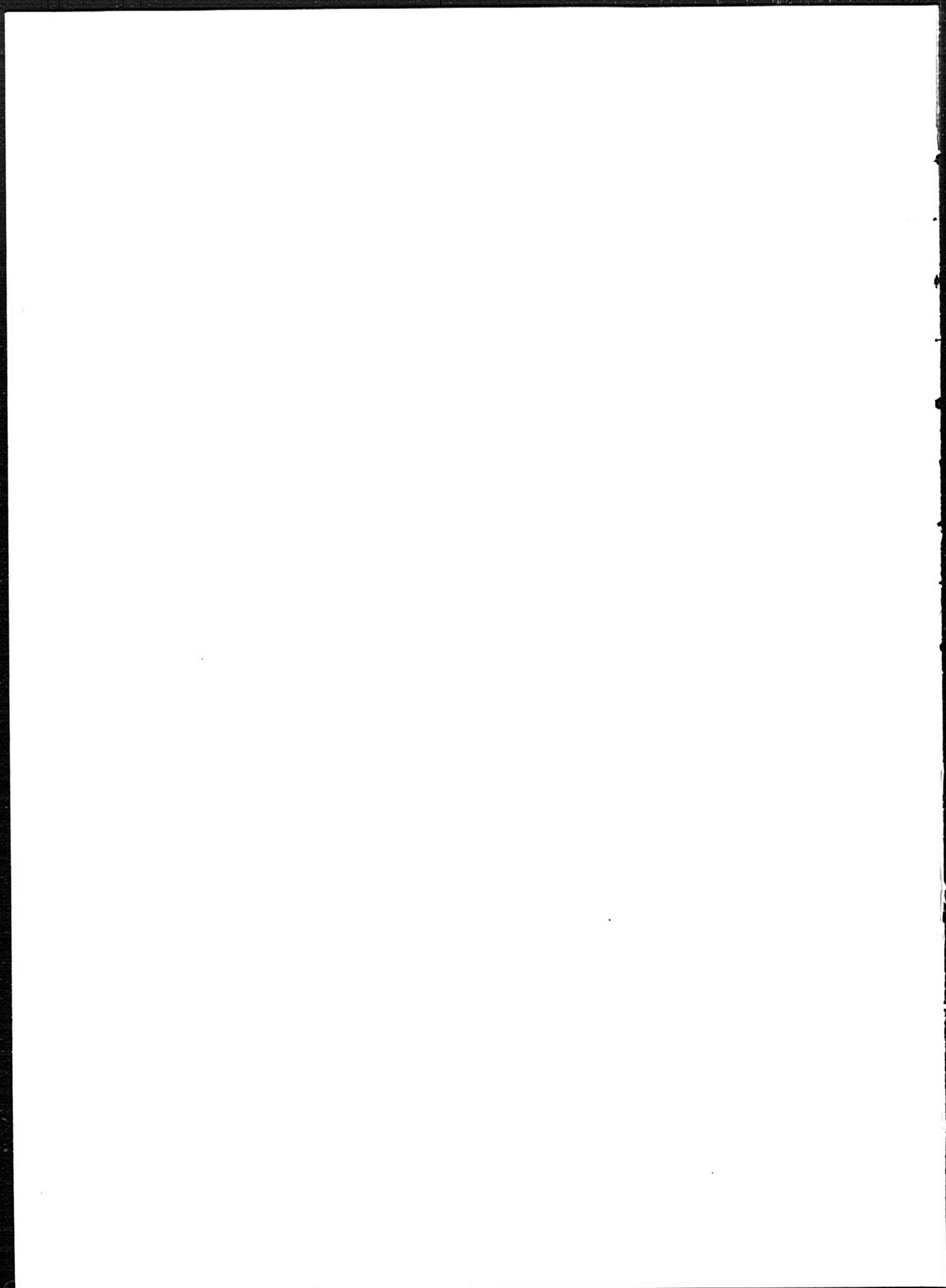
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App. 3

SEC. 3.28(c) (Now 73.28(d))

* * *

(c) Upon showing that a need exists, a class II, III, or IV station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour; provided; (1) no objectionable interference will be caused by the proposed station to existing stations or that if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference; and (2) primary service will be provided to the community in which the proposed station is to be located; and (3) the interference received does not affect more than 10 percent of the population in the proposed station's normally protected primary service area; . . .



P-7-2057
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(3)

APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,088

CENTRAL BROADCASTING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

NO. 20,306

CENTRAL BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents.

APPEAL FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

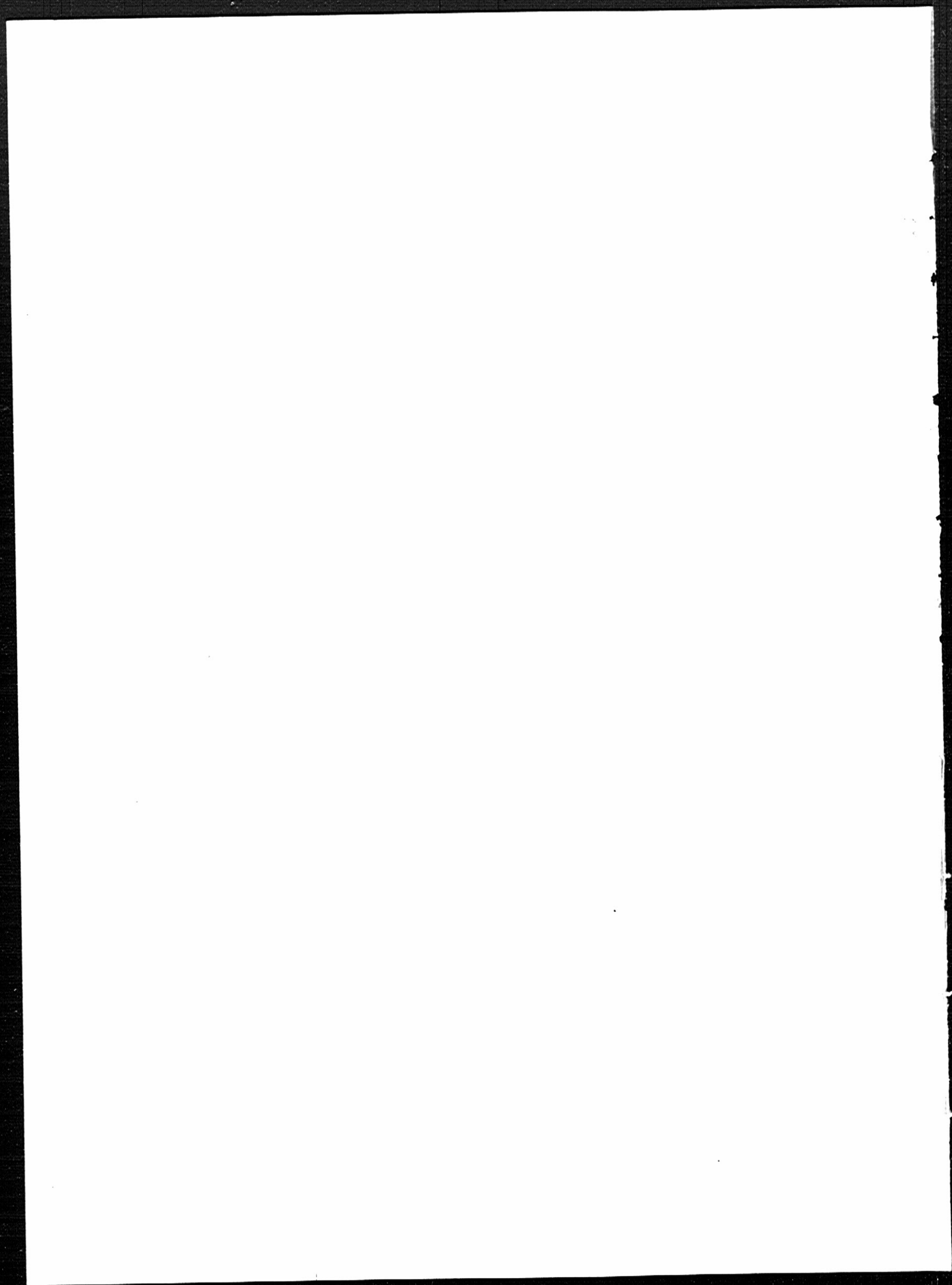
FILED OCT 10 1966

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(i)

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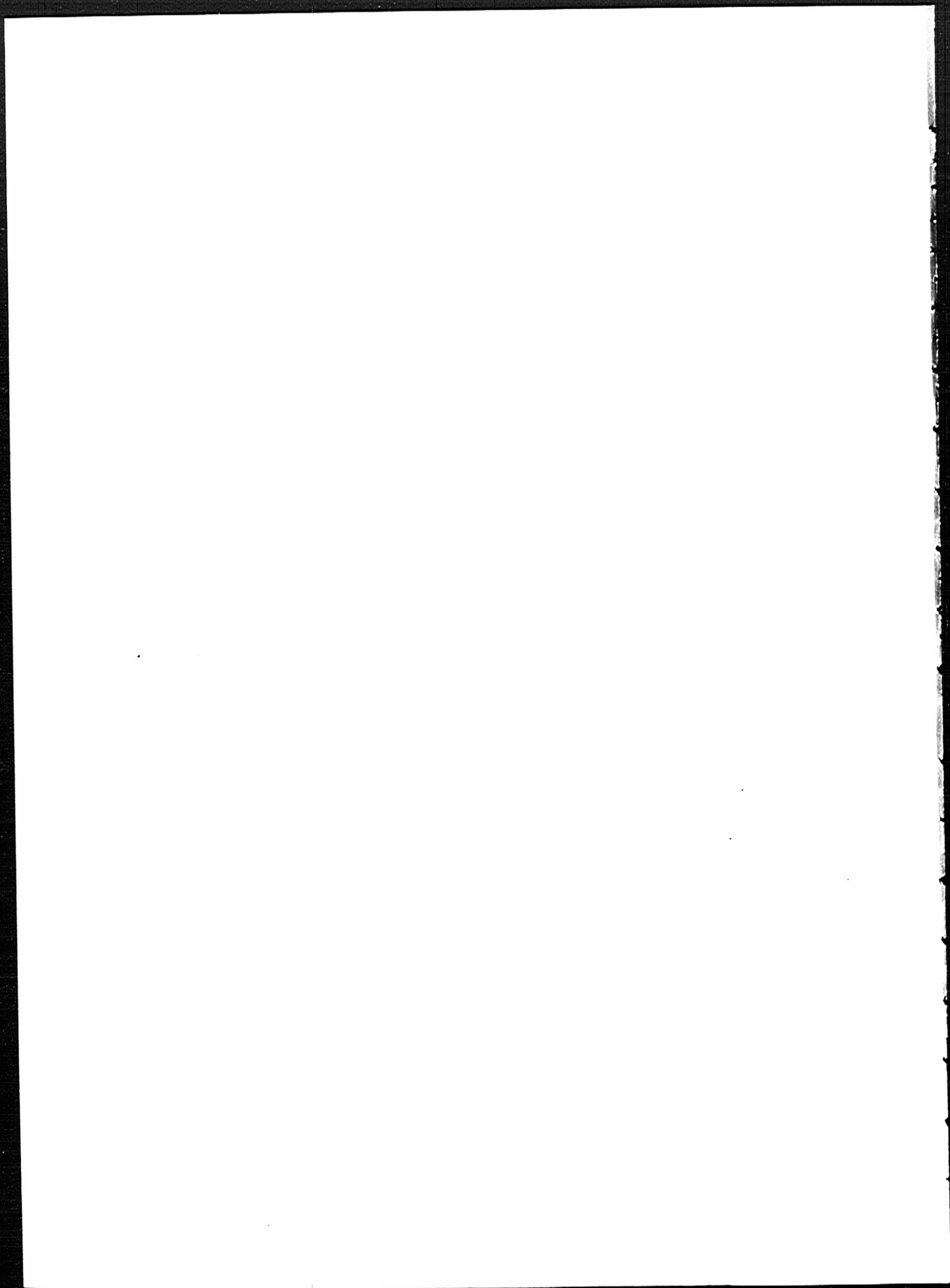
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APPEAL FROM DECISIONS AND ORDERS OF THE
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APPELLANT'S REPLY BRIEF



**I. The Commission's Refusal To Reopen the Record
To Admit Engineering Evidence
That Was Accurate**

The Commission's brief treats, in two separate parts, the question as to whether or not the Commission was arbitrary in refusing to reopen the record to admit into evidence field engineering measurements. First, it states that Central's offer was late and secondly, that the Commission properly relied on the theoretical values of Figure M-3 of its Rules even though it knew such values were wrong. These questions are not so distinct that they can be treated separately. The overriding question is whether the public interest is served in a case in which the Commission bases its decision on a map that is admittedly in "serious error," when accurate information is at hand which would require an opposite result. The question of timeliness under such circumstances is secondary to the overriding public interest considerations.

What the Commission is saying is that if the proffer of evidence had been timely, then any reliance by the Commission on its erroneous Figure M-3 of the Rules would have been improper since the public interest would have demanded that the Commission consider the true facts of the case as shown in the field intensity measurement data. However, in this case, merely because of a question of timeliness, the public interest is relegated to the scrap heap in favor of procedural niceties.

The mere fact that the offer of evidence was subsequent to an initial decision (it was eight months before the Review Board's decision and more than fourteen months before the Commission's final decision) is simply a matter to be considered in determining the overall public interest. Sound regulation has substantive, as well as procedural, ele-

ments and, clearly, the public interest, convenience and necessity comprehends both (*Valley Telecasting v. FCC*, 118 U.S. App. D.C. 410, 336 F.2d 914 (1964)). The only argument that the Commission raises against consideration of Central's field intensity measurements is based on the rather loose phrase "administrative finality." What the Commission seems to say is that such finality overrides public interest considerations and, as far as this case is concerned, overrides an obligation to determine the true facts of the case. Even the cases cited by the Commission have no relevance to the position it has taken. The cases cited have reference to proceedings in which there were competing applications (*Guinan v. FCC*, 111 U.S. App. D.C. 371, 297 F.2d 782 (1961); *Kidd v. FCC*, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962)), or in which a party has, after an application has been granted, petitioned for reconsideration without being able to advance reasons why such pleadings were not filed prior to the particular grant in question. In both the *Kidd* case, *supra*, and the case of *Colorado Radio Corp. v. FCC*, 73 U.S. App. D.C. 225, 118 F.2d 24 (1941), the Court clearly pointed out that the proffered evidence which was the subject of the petition to reopen the record in each of those cases was considered by the Commission, and in each case was found to be of no decisional significance. Here the proffered measurement data has never even been glanced at by the Commission, and it is of crucial decisional significance since it would compel a completely opposite decision to the one reached here. Another case cited in the Commission's Brief, *Hocking Valley Broadcasting Corp.*, 17 Pike & Fischer R.R. 294 A (1958), if anything, is in support of appellant's position, for there the Commission was careful to point out that the pleading in question was not accompanied by measurements and did not, contrary to the facts of this case, contain allegations of fact that would affect its decision. In that case, the Commission cited *WKAT, Inc.*, 6 Pike & Fischer R.R. 260 (1950) and *Marmat Radio Company*, 6 Pike & Fischer R.R. 51

(1950) as properly holding that a record should be reopened to receive engineering exhibits in the form of field intensity measurements to show that interference would be less than that shown in the record so as to make it possible to grant an application which would otherwise not be possible and, also, to receive in evidence measurements where the ground conductivity shown on Figure M-3 was not correct. These are the very cases that have been cited by appellant-petitioner in support of its position.

In further distinction of the *Colorado Radio* case, *supra*, from the present one, it is submitted that there the Commission refused the efforts of an intervenor who waited until after a second final decision in a hearing case to request a second reopening of the record, to present evidence which existed at the time the record was reopened for the first time. The Commission pointed out that an interested person should be alert to protect his own interests. That statement is of particular applicability to this case since Station WHEO, which is the station cited by the Commission as the primary reason for denying the Central application, withdrew from the proceeding prior to the commencement of the hearing. The *Colorado Radio Corp.* case, *supra*, is not applicable here since Central did not sleep on its rights, but came to the Commission with valid and important factual information that was essential to a correct decision long, long before that final decision was released. The instant case is quite similar to the case of *Dixie Radio, Inc.*, 24 Pike & Fischer R.R. 666 (1962) which involved a 10% rule violation by reason of the fact that the applicant would receive 11.7% interference. The applicant had taken measurements and requested reopening of the record after it was closed to receive them. The Commission directed that the record be reopened to receive the measurements into evidence stating " . . . a record consistent with the facts as they currently exist is essential to reach a proper public interest determination . . ."

In a collateral attack, the Commission takes the position that Central should not be heard to explain the reasons why measurements were not taken prior to the commencement of the hearing. The Commission would have this Court pay no attention to the fact that the issues as specified by the Commission in the hearing order did not require any showing with respect to existing interference received by Stations WHEO and WSAT. The Commission does not dispute the fact that the initial engineering exhibit prepared by Central presented the factual information called for by the Commission's Rules and that it was only upon the request of the Commission's Broadcast Bureau that additional information, namely, the interference received by WHEO and WSAT from existing stations, was prepared. This is not a matter of argument not presented to the Commission before, but is simply an explanation of the difficulty faced by Central in bringing in measurement data in time for the hearing itself. Furthermore, this argument is a matter of record and is covered by stipulated Issue No. 2 set forth in the prehearing stipulation of the parties hereto.

The Commission next proceeds to take the position that irrespective of the issue, as specified by the Commission in its hearing order, the applicant had the obligation and burden of knowing that the Commission has certain "traditions" that an applicant is required to meet. The Commission further states that part of this tradition is a demonstration of a total interference picture in order to meet the requirements of Rule 73.24(b). In the first place, the applicant in a hearing has the burden of meeting specified issues and here, the issue on interference did not specify Section 73.24(b) of the Commission's Rules.¹ Secondly, Rule 73.24(b) speaks only of the interference which would be caused by an applicant to existing stations, and does not mention inter-

¹ This is in contrast to the issue on multiple ownership in this proceeding, which specifically refers to Section 3.35 (now 73.35) of the Rules.

ference which the existing stations are already receiving. It is difficult to conceive a more impossible requirement that applicants observe some unwritten and unspecified "tradition" of an administrative agency in order to successfully obtain the benefits and meet the requirements contemplated by Congress in establishing that agency.

If the Commission desired information other than that called for by the issues, it had the opportunity to specify what additional information was required at any point during, or for that matter, after, the hearing. (*Marmat Radio Company, supra*). That it failed to do so and that because of such failure, Central did not come in with measurement data at the time of the hearing, should certainly not be held against Central. The fact is that had the issues been clear in their requirements, then Central's initial review of the engineering problems would have dictated a different approach to the case including the taking of measurements. However, as it turned out, it was only upon request of the Broadcast Bureau on the eve of the hearing that a study of existing interference received by Stations WHEO and WSAT was made.

In continuing its argument, the Commission takes the position that it did not act unreasonably in basing its decision on admittedly erroneous evidence. This is a little difficult to rationalize, particularly in view of the Commission's clear-cut rationale in the *Marmat Radio Company* and *WKAT, Inc.* cases, *supra*. The Commission cannot seriously argue that it should decide public interest cases on facts which it acknowledges to be in serious error.

That the soil conductivity map is in "serious error" is not disputed. That the Commission relied on that map is likewise not disputed. Therefore, there can be no dispute that the Commission decision, insofar as it used evidence based on the conductivity map, must likewise be in "serious error" which, in fact, it is. If there is no ex-

isting interference received by Station WHEO, then that fact cannot be ignored. Clearly, to do so is contrary to the public interest when there are no counterbalancing factors that would dictate otherwise.

The reference the Commission makes to certain regulations does nothing to help its case. Rule 73.152 quoted by the Commission emphasizes that groundwave field intensity measurements such as those taken in this case take precedence over theoretical values which are based on the ground conductivity map (Figure M-3). Furthermore, Rule 73.183, referred to by the Commission, clearly states in subsection (c) thereof that "it is recognized that in areas of limited size or over a particular path, the conductivity may vary widely from the values given; therefore, these maps are to be used only when accurate and acceptable measurements have not been made." In this case, accurate and acceptable measurements have been made. Thus, under the Commission's Rules, the ground conductivity map should not be used. Furthermore, the Commission's statement that the Department of Commerce letter presents no new facts is unrealistic. While the Commission has indicated that actual conductivity may vary from that shown of Figure M-3, it has not, prior to the issuance of that letter, acknowledged that its conductivity map was in "serious error." It is difficult to understand how the Commission can take the position that the map is in serious error on the one hand, and yet represent to this Court that the public interest requires reliance on it. Indeed, where basic factual data has been found to have changed or to be in error, the Commission has required the reopening of a record to receive the accurate factual data necessary to a proper decision. (*Marmat Radio Company, supra*, and *WKAT, Inc., supra*). See also *Creek County Broadcasting Co.*, 21 Pike & Fischer R.R. 816 (1961), where after the close of a hearing record in which extensive engineering exhibits had been prepared and after the issuance of an Initial Decision, the Commission required that the record be reopened to receive the most recent census data.

II. The Commission Applied the 10% Rule Standard in Denying Central's Application

The Commission's brief unsuccessfully attempts to explain away the Commission's reference to the 10% rule in passing on Central's application. It is not disputed that the controlling factor in denying the application of Central was the fact that Station WHEO, by reason of the addition of 6.1% of interference from Central's proposal to 5.7% interference allegedly received from Station WMPM, resulted in Station WHEO receiving interference to 11.8% of the population. This alleged interference, the Commission pointed out, exceeded 10% and, as such, resulted in the service of WHEO being reduced to an unsatisfactory degree. The Commission's brief takes the position that since the reference to the 10% figure was contained in a footnote, it wasn't considered by the Commission. This simply begs the question, for if it wasn't considered by the Commission, then why was it even mentioned? Certainly, where the Commission states that inefficiency begins at 10%, and cites the so-called 10% rule in support of its thesis, then it is inconceivable that the Commission did not consider the 10% standard as contained in that rule as the point at which service is reduced to an unsatisfactory degree. The WMAX case (*WMAX, Inc.*, 29 FCC 706, reconsideration denied, 30 FCC 104, affirmed *sub nom*, *Atlas Broadcasting Co. v. FCC*, 111 U.S. App. D.C. 196, 295 F.2d 183 (1961)), contrary to the position taken by the Commission, made no mention of a 10% standard, although the loss there was in the order of 20%. What it did point out was that no party had asked for a programming issue and, therefore, the question of relative needs had to be presumed to be in balance. The Examiner's reference to the 10% rule (then 3.28(c)) had nothing to do with the rule as a criteria for determining whether or not service was reduced to an unsatisfactory degree, but only to the fact that the Commission may look to percentage relationships in balancing the need for a new service as opposed to the loss of an existing service.

Thus, contrary to the position taken by the Commission in its brief, there can be no doubt that the 10% rule standard was applied in this case and that it was used as the cut-off point in erroneously determining that the service of Station WHEO was reduced to an unsatisfactory degree by the Central proposal. The question is not whether the Commission can establish a 10% interference standard as a point at which service is reduced to an unsatisfactory degree. The question is whether it can do so without first advising interested parties of that position. The Commission has never taken such a position before, traditionally or otherwise. The fact that it took such a position in this case cannot be seriously disputed. Central, had it been properly advised of such a standard, could have prepared evidence to meet it. However, it was not advised of the new standard to be applied to its application by precedent, "tradition," or otherwise. Moreover, as pointed out before, Rule 73.24(b) under which the Commission states the application was being heard, calls for information concerning only the interference that would be received by an applicant and not cumulative interference that an existing station might receive because of other existing stations.

III. The Commission Abused Its Discretion in Denying Central's Application

The Commission in its brief (page 24) takes the position that the Commission's decision was reasonable because the primary consideration in what it terms a Section 73.24(b) case, is the question of comparative need—that is—whether the need for the service to be gained outweighs the need for the service to be lost. It points out that there has been no showing that the gain area needs Central's proposed service. This is contrary to the position which the Commission takes on page 12 of its brief that "the evidence of record shows that the need for the service to be gained primarily by residents of the well-served large city of Charlotte, North Carolina, did not outweigh the need for service to be

lost by small market Station WHEO and WSAT." In any event, the very case cited by the Commission, namely *WMAX, Inc., supra*, as has already been pointed out above, establishes the principle that where no evidence as to the program services of the interfering and interfered with stations is present in the record, it must be presumed that the needs of the people within the gain area and interference area are balanced. More recently, in *KPLT, Inc.*, 1 Pike & Fischer R.R. 2d 774, 2 Pike & Fischer 801 (1964), affirmed, *sub nom. O'Connor Broadcasting Corp. v. FCC*, U.S. Court of Appeals for the District of Columbia Circuit, Case No. 18,944, decided May 28, 1965, the Commission by its Review Board, stated that in Section 73.24(b) cases where the applicant presents only engineering evidence which shows that the proposed operation would result in the gain of an additional service to more persons than would lose service as a result of the proposed operation, the applicant has established a *prima facie* case for a grant.² In such circumstances, the Commission said, it is incumbent on the respondents in the case (here WHEO and WSAT) to come forward with evidence offsetting the applicant's showing. Their failure to do so requires that a grant be made to the applicant. Moreover, in *KPLT, Inc., supra*, the Commission held that in Section 73.24(b) cases, where the respondents do not seek enlargement of the issues to permit showings of respective programming services in the interference areas in question, it must be *presumed* that the respondents respective programming services meet no special needs of the populations in the interference areas. It, therefore, must be concluded that the much larger numbers of persons to receive an additional service from the proposed operation, far outweighs the small number of persons who would lose service as a result of the proposed operation, compelling the conclusion that the pro-

² In *KPLT, Inc., supra*, the Commission granted an application for an increase in power, despite the fact that it resulted in a *net loss* of service to the public.

posed operation would be in the public interest, convenience and necessity, and, therefore, the application should be granted (*KPLT, Inc.*, 1 Pike & Fischer 2d 774, 780 (1964)). Since that is exactly the situation which obtains here, this leaves for determination only the question of overall efficiency.

Unlike the net loss of service which resulted in *KPLT, Inc.*, *supra*, the number of persons who will gain service here is almost 100 times the number of persons who will lose service.

It is most significant that here, Station WHEO, the station losing the service, and the loss of which was the basis for the Commission's decision, withdrew from the proceeding. This must be considered as tantamount to a recognition by Station WHEO that the need for its service in the interference area was of no significance. While the Commission's judgment as to what is in the public interest must be controlling, it is the station's *programming* that establishes whether or not a need exists for the service. Station WHEO did not introduce such information in this case and, therefore, the Commission cannot make a determination that the need for the service to be lost outweighed the need for the service to be gained. (*KPLT, Inc.*, *supra*; *International Radio, Inc.*, 1 R.R. 2d 701, 2 R.R. 2d 103 (1963)). In the *International Radio, Inc.*, case, *supra*, the argument was made that only the areas to be gained and lost were in evidence and that there was no demonstration as to "need" for the proposed service. The argument was rejected by the Examiner, by the Review Board and by the Commission in refusing to review the case. There, the Commission's position was (the same as in the *WMAX* and *KPLT* cases, *supra*), that whether the loss was of significance depended on programming and that in the absence of such information in the record, it must be presumed that the question of needs was balanced.

It is thus quite clear that precedent is contrary to the position taken by the Commission here. The Commission's decision should

have been determined on the basis of efficiency, meaning the population gained and lost, and the availability of other services to the loss area (*International Radio, Inc.*, and *KPLT, Inc.*, both *supra*). Here, there is no question that the loss area is more than adequately served by stations other than Station WHEO. Therefore, the question is whether the maximum efficiency proposed by Central, as well as an almost 100% increase in persons receiving its service (over 240,000 persons) outweighs the populations to be lost, particularly the populations to be lost by Station WHEO (2,564 persons). From this standpoint, and based on Commission precedent, there can be no doubt that the Commission's decision was unreasonable and an abuse of its discretion.

CONCLUSION

For the foregoing reasons, Central Broadcasting Company submits that the Commission's decisions should be reversed and the case remanded to the Commission for further proceedings in accordance with law.

Respectfully submitted,

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October 10, 1966.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,088

CENTRAL BROADCASTING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

United States Court of Appeals
for the District of Columbia Circuit

No. 20,306

FILED SEP 23 1966

CENTRAL BROADCASTING COMPANY,
Petitioner,

Nathan J. Paulson
CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON APPEAL FROM A DECISION AND TWO
MEMORANDUM OPINIONS AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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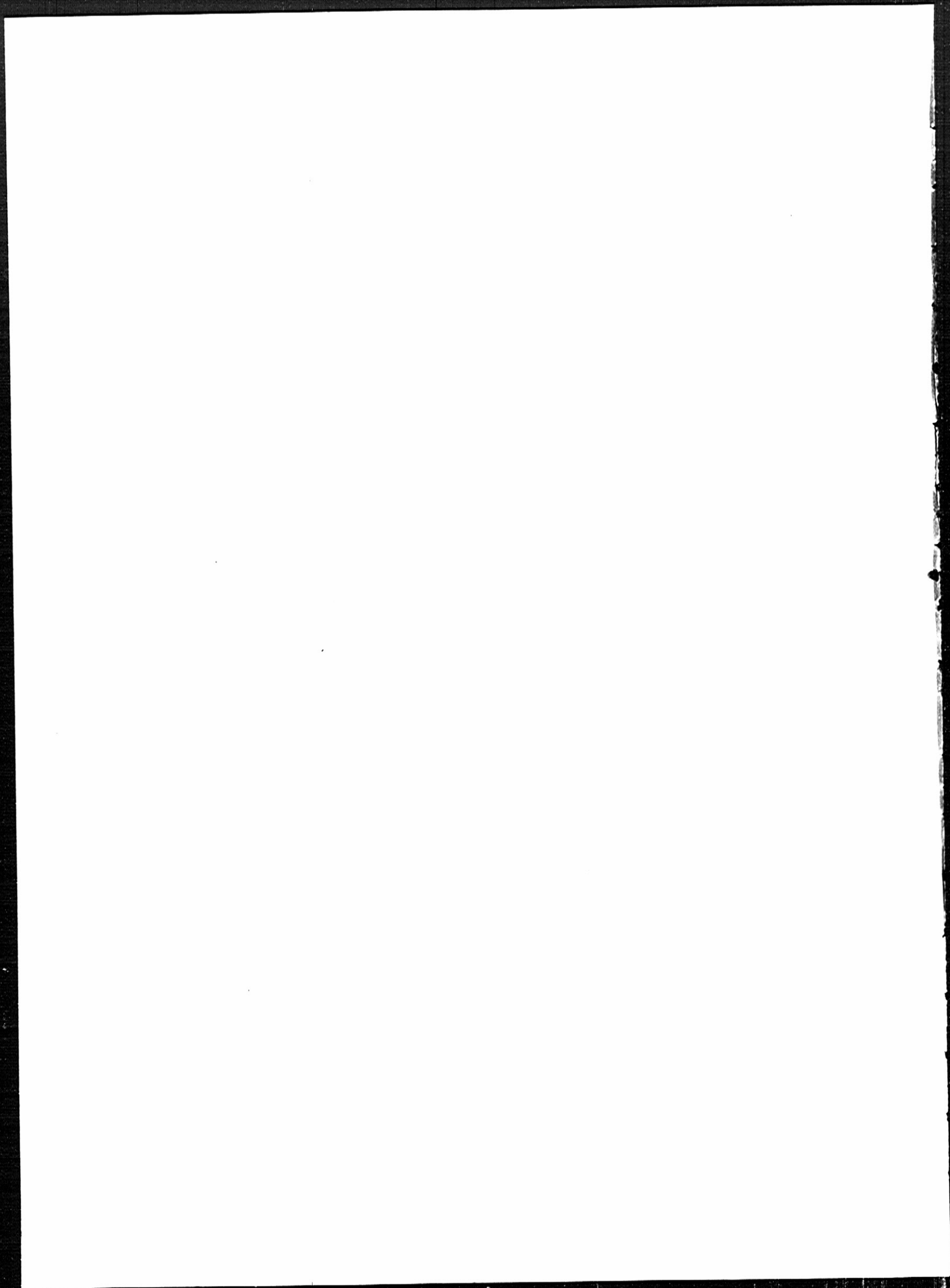
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STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court, are properly set forth in appellant's brief.

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*Cases and other authorities chiefly relied upon are marked by an asterisk.

IN THE UNITED STATES COURT OF APPEALS
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No. 20,088

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ON APPEAL FROM A DECISION AND TWO
MEMORANDUM OPINIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), and a petition to review filed pursuant to Section 402(a) of the Communications Act and the Judicial Review Act of 1950, 5 U.S.C. 1031, et seq. The appeal is from a Decision of the Federal Communications

Commission released December 27, 1965 (R. 521-522), and a Memorandum Opinion and Order of the Commission released March 4, 1966 (R. 532-533), denying reconsideration of the Commission's Decision. The Commission denied the application of Central Broadcasting Company (Central) to increase its power during its daytime hours of operation from one to five kilowatts because, after balancing the gains versus losses of service pursuant to the provisions of Section 73.24(b) of the Commission's Rules,^{1/} it found that the serious erosion of service of an existing station (WHEO) plus additional interference to another existing station (WSAT) outweighed the public benefit which would result from the proposed new service. The petition to review seeks review of a Memorandum Opinion and Order of the Commission released June 3, 1966 (R. 562-563), denying Central's petition requesting the Commission to seek a remand of the above proceeding from this Court. Since these two cases arise from the same proceeding, they were consolidated by this Court by Order filed July 13, 1966.

Because appellant's statement of the case is argumentative and incomplete, the following counterstatement is submitted. Central

^{1/} Section 73.24(b) of the Commission's Rules, 47 C.F.R. 73.24(b), was amended effective August 13, 1964. However, the former Section 73.24(b) continues to apply to applications filed prior to July 13, 1964. Thus, Central had to show that "the need for the proposed service outweighs the need for the service which will be lost" because of interference.

is the licensee of Station WCGC, an unlimited time, Class III station operating on 1270 kilocycles in Belmont, North Carolina. On October 11, 1961, Central filed an application to increase the daytime power of WCGC from one to five kilowatts, non-directional. An Order was released June 17, 1963 (R. 54-56) designating Central's application for hearing. The issues pertinent to this appeal were designated as follows:^{2/}

To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WCGC and the availability of other primary service to such areas and populations.

To determine whether the proposal of Central Broadcasting Company would cause objectionable interference to Stations WHEO, Stuart, Virginia, and WSAT, Salisbury, North Carolina, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

The following salient facts relative to the above issues were established at the hearing which took place on November 12 and 13, 1963. Belmont is a town of 5,007 persons located 12 miles from Charlotte, North Carolina, a city with a population of 209,551. The two communities are situated in separate counties. WCGC presently serves 162,406 persons within its 2.0 mv/m contour, of whom 64,961

^{2/} Also designated were issues on Sections 3.35 (a) and (b) of the Commission's Rules (now Sections 73.35(a) and (b) , 47 C.F.R. 73.35(a) and (b) (1965)), concerning multiple ownership of standard broadcast stations. These issues were resolved in Central's favor and are not before this Court on appeal.

reside in Charlotte, and 246,763 persons within its interference-free 0.5 mv/m contour. WCGC's proposed operation would raise these figures to 358,157 and 491,106 persons, respectively. The new 2.0 mv/m contour would cover all of Charlotte, which would account for 144,590 of the 195,751 persons in the 2.0 mv/m gain area (R. 331-332). There are two 100% services to the entire 0.5 mv/m gain area; to any part, there is a minimum of 8 and a maximum of 17 other services (R. 188). In the 2.0 mv/m gain area, there is one 100% service to the entire area, and a minimum of 2 and a maximum of 9 stations providing a 2.0 mv/m or greater signal to any part of this area (R. 190). However, of the 195,751 persons in the 2.0 mv/m gain area, only 146,690 need a 2.0 mv/m signal for primary service (i.e., live in cities with populations in excess of 2,500).^{3/} 144,590 of these latter persons reside in Charlotte which has eight standard broadcast stations. The other 2,100 persons needing a 2.0 mv/m signal for primary service live in Clover, South Carolina, a town of 3,500 which receives primary service from three other stations (R. 332).

As to the interference issue, the evidence showed that WCGC's proposed operation would cause co-channel interference to Station WHEO, Stuart, Virginia. WHEO now receives interference

^{3/} Section 73.182(g) of the Commission's Rules contains the signal strengths necessary for primary service.

to 2,404 persons in an area of 44.8 square miles from Station WMPM, Smithfield, North Carolina. This represents 4.35% of the area (1,030 square miles) and 5.7% of the population (42,128 persons) within WHEO's normally protected 0.5 mv/m contour. WCGC would deprive an additional 2,564 persons in an area of 39.1 square miles of WHEO's service. The aggregate interference to WHEO (83.9 square miles and 4,968 persons) would then represent 8.15% of the area and 11.8% of the population within WHEO's normally protected 0.5 mv/m contour. This loss area would be served by a minimum of three and a maximum of ten other services (R. 332-333). Although the loss area is located largely in North Carolina, it is less than 18 miles from WHEO and over 100 miles from WCGC (R. 437).

Additionally, WCGC would cause adjacent channel interference to Station WSAT, Salisbury, North Carolina. WSAT presently receives interference to 2,338 persons in an area of 55.7 square miles, which represents 1.73% of the population (135,503 persons) and 3.64% of the area (1,530 square miles) within its 0.5 mv/m contour (R. 333). WCGC would add 1,971 persons in an area of 26.3 square miles for a total of 4,309 persons in an area of 82 square miles, or 5.35% of the area and 3.19% of the population within WSAT's normally protected 0.5 mv/m contour. A minimum of 10 and a maximum of 14 other signals serve the additional loss area (R. 234 and 333).

The Hearing Examiner released his Initial Decision May 11, 1964 (R. 330-342) denying Central's application. The Examiner stated that in weighing the relative needs of the gain and loss areas, as required by Section 73.24(b) of the Commission's Rules, "fairness requires, in the absence of a specific showing that there is a genuine need for the extension of service by WCGC, that protection be extended to small market stations WHEO and WSAT against the countervailing desire of WCGC to improve its position in the abundantly served Charlotte market" (R. 341).

On October 14, 1964, five months after release of the Examiner's Initial Decision, eleven months after completion of the hearing, and sixteen months after the application was designated for hearing, Central petitioned the Commission's Review Board, before which an appeal from the Initial Decision was pending, to remand the case to the Examiner so that he might receive new engineering evidence (R. 384-402). The proffered evidence consisted of new interference figures based on field intensity measurements which purportedly showed that Station WHEO actually received no interference from Station WMPM, thus reducing the cumulative interference to WHEO.^{4/} In a Memorandum Opinion and

^{4/} The interference figures of record, as submitted by Central, *supra*, p. 5, are based on the Commission's soil conductivity map (Figure M-3). This map provides a method whereby contours can be predicted and plotted without actual field measurements being taken. However, the taking of actual measurements is preferred as a matter of Commission policy (see Sections 73.152, 73.182(s) and 73.183(a) of the Commission's Rules, 47 C.F.R. 73.152, 73.182(s) and 73.183(a)).

Order released December 23, 1964 (R. 412-414), the Review Board denied Central's petition on the ground that no good cause for its lateness had been shown.

Thereafter, on June 4, 1965, the Review Board released a Decision reversing the Examiner and granting Central's application (R. 435-442). The Board concluded that although "this case is a very close one," a grant would effect a more efficient utilization of this Class III frequency because of the large number of persons who would gain a new reception service.

Radio Station WSAT, one of the stations which would receive interference by virtue of Central's increased coverage, successfully petitioned the Commission to review the Review Board's Decision (R. 472). As a result, the Commission, by Decision released December 27, 1965 (R. 521-522), indicated that it was in general agreement with the rationale of the Hearing Examiner's Initial Decision and denied Central's application. The Commission stressed the fact that although the gained service would be significant, it would not reach any persons who are presently underserved. After carefully balancing the gains versus losses of service pursuant to the provisions of Section 73.24(b), it concluded that "the serious erosion of service of an existing station (WHEO), plus additional interference to WSAT . . . outweighs the public benefit which would result from the new service" (R. 522).

Central petitioned the Commission for reconsideration of its Decision in light of the engineering evidence Central had earlier proffered to the Review Board along with its petition to reopen the record. Such petition had been denied by the Board approximately two years earlier for failure to demonstrate good cause at that time for the delinquency of its request. Alternatively, Central requested the Commission to review and reverse the Board's aforesaid ruling and to remand the proceeding for consideration of this evidence (R. 524-527). The Commission denied Central's request by Memorandum Opinion and Order released March 4, 1966 (R. 532-533), concluding that the Review Board had properly refused to reopen the record. It also pointed out that Central had not referred to the Board's ruling in its briefs to the Commission after review had been granted, even though the matter of interference to WHEO was a major consideration in that appeal.

Finally, on April 22, 1966, after it had filed its Notice of Appeal herein, Central petitioned the Commission to ask this Court to remand the proceeding (R. 537-544). This request was predicated on a March 22, 1966 letter received by WCGC from the United States Department of Commerce asking for proof-of-performance records so that the Commission's soil conductivity map (Figure M-3) might be improved. Central asserted that this admission of error in regard to the soil map was new evidence warranting reopening

of the record to permit its field intensity measurements to be admitted. The Commission denied this request in a Memorandum Opinion and Order released June 3, 1966 (R. 562-563), stating that "since 1939, we have consistently warned all interested parties that the soil conductivity map is based on 'general areas of reasonably uniform conductivity,' that wide variations are possible, and that the map should not be used in lieu of accurate measurements when they are available." The Commission thus concluded that no reason had been advanced to warrant reversal of the earlier rejections of Central's measurements because of Central's laches.

From these various decisions and orders, Central appeals.

SUMMARY OF ARGUMENT

The Commission acted in a reasonable manner in refusing to reopen the hearing record in this proceeding to admit substitute engineering evidence. Appellant's proffer of further evidence was inexcusably late, coming as it did eleven months after the hearing record had been closed and five months after release of the Examiner's adverse Initial Decision. No unusual and compelling circumstance was presented justifying the requested reopening. Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962). As this Court stated in Colorado Radio Corp. v. Federal Communications Commission, 73 U.S. App. D.C. 225, 227, 118 F.2d 24, 26 (1941), "We cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of new evidence." Where the evidence is not a new development, but rather a request for a second opportunity to offer evidence, this Court has consistently found administrative finality to be in the public interest. Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 297 F.2d 782 (1961).

Appellant's argument that evidence as to existing interference to Station WHEO was not required under the issues as framed is improperly before this Court since it was never made to the Commission. 47 U.S.C. 405. Moreover, this argument

is patently fallacious. Where interference will be caused to an existing station, the total interference picture in regard to that station has traditionally been deemed necessary in order to make a meaningful determination of comparative need under Section 73.24(b) of the Commission's Rules, 47 C.F.R. 73.24 (b), which is the crux of this case.

The Commission properly relied on the engineering evidence submitted during the hearing by Central, based on the theoretical values of Figure M-3 of the Rules. The Commission permits applicants to prove the extent of interference by the use of theoretical values or by actual field intensity measurements. Appellant, knowing the limitations of the theoretical method, chose to rely on it as the basis for its engineering showing. Only after receiving an adverse decision from the Examiner did it endeavor to substitute new evidence based on measurements. The Commission properly refused to allow this belated substitution and was not unreasonable in basing its decision on Central's original engineering showing.

Contrary to appellant's assertion, the Commission did not rely on the "10% rule" (Section 73.28 (d) (3) of its Rules, 47 C.F.R. 73.28 (d) (3)) as a ground for denying Central's application. The "10% rule" was merely referred to by the Commission in a footnote as an example of how a percentage loss

of service within a new station's normally protected contour could result in a proposal being considered inefficient.

The Commission's denial of Central's application was a reasonable exercise of its discretion. The evidence of record showed that the need for the service to be gained, primarily by residents of the well-served large city of Charlotte, North Carolina, did not outweigh the need for the service to be lost by small market stations WHEO and WSAT. Thus, the Commission properly found that the Section 73.24 (b) balance was weighted against appellant.

ARGUMENT

I. THE COMMISSION ACTED PROPERLY AND WITHIN ITS DISCRETION IN REFUSING TO REOPEN THE HEARING RECORD TO ADMIT FURTHER ENGINEERING EVIDENCE.

A. Appellant's Proffer of Further Evidence Was Inexcusably Late.

Appellant asserts that the Commission erred in not remanding this case and reopening the record in order to receive additional engineering evidence going to the amount of interference received by Station WHEO. In order to warrant such a disruptive course of action, a petitioner must show that it had good cause for waiting until the record was closed before offering the new evidence, and that there are unusual and compelling circumstances justifying reopening the record. Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962). Central has not made the requisite showing in this case.

Central's application was designated for hearing by Order released June 17, 1963. The hearing was held and the record closed on November 13, 1963. Central's evidence under the interference issue was based largely on the theoretical values contained in the Commission's soil conductivity map (Figure M-3). An Initial Decision adverse to Central was released on May 11, 1964. Thereafter, on October 14, 1964, Central petitioned the Review Board to reopen the record in order to admit evidence

consisting of actual field intensity measurements which purportedly show that the total interference caused to Station WHEO is less than that shown in Central's original evidence.

This request was made eleven months after the record had been closed and five months after the release of the Examiner's Initial Decision. In support of its allegation that good cause existed for its requested action, Central contended that it did not learn of the "exact interference problem" which would be caused by its proposed operation until "the eve of the hearing." Central further alleged that it did not submit actual measurements based on field intensity at that time because its consulting engineer, who had been retained shortly prior to designation of its application for hearing, was unable, due to prior professional commitments, to immediately devote the time necessary to conduct these measurements. According to Central, as soon as its engineer was available, the measurements were, in fact, made. The Review Board correctly held that this was an insufficient showing of good cause for the lateness of Central's request.

We submit that Central's reasons for its tardiness were patently lacking in merit. First, in answer to the late-employed engineer excuse, it must be remembered that Central's request was filed at least sixteen months after the consulting engineer was retained. During all this time, Central never notified anyone that it was taking or even intended to take measurements. Second,

it seems apparent that Central found the measurements necessary only after release of the Examiner's unfavorable Initial Decision.

In a markedly similar situation, this Court affirmed the Commission's denial of a petition for rehearing, stating that "[a]ppellant does not offer newly discovered evidence but, rather, evidence easily discoverable initially, and apparently only now deemed crucial by appellant when seen from the highland of hindsight." Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 376, 297 F.2d 782 (1961). Here, just as in Guinan, the evidence originally introduced by appellant was obtained essentially on the basis of soil conductivities set out in Figure M-3 even though the Commission's Rules (see Section I, B, infra) clearly indicate that the preferred basis on which to predicate such evidence is actual field intensity measurements. In other words, as the Court recognized in Guinan, "the appellant, with full knowledge of the facts, chose the easier of two methods to garner the evidentiary data it needed." 111 U.S. App. D.C. at 375. Its choice having been proved unwise, it cannot come back with substitute evidence.

A further illustration of appellant's opportunistic approach is the fact that it never appealed in timely fashion from the Review Board's denial of its petition to reopen the record, and it did not see fit to argue the matter of the admissibility of its measurements before the Commission when the Review Board's

grant of its application was being reviewed. Rather, it attacked the Board's adverse ruling for the first time in its petition requesting the Commission to reconsider its decision reversing the Board and denying Central's application.

Appellant's allegation that it did not learn of "the exact interference problems" until "the eve of the hearing" is apparently related to the assertion made for the first time in its brief on appeal that evidence as to existing interference to Station WHEO was not required under the issues as framed (Br. 3, 10, 13).

As a threshold matter, we point out that this argument must be rejected since it was never made to the Commission. Section 405 of the Communications Act^{5/} and this Court's decisions establish that legal and factual matters which are not presented to the Commission, but are instead raised for the first time on appeal, will not be considered. Harry Wallerstein v. Federal Communications Commission, Case No. 19,904, judgment filed June 20, 1966; Florida Gulfcoast Broadcasters v. Federal Communications Commission, 122 U.S. App. D.C. 250, 352 F.2d 726 (1965); Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 243 F.2d 209 (1957); Democrat Printing Co. v. Federal

^{5/} "The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review . . . (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass . . ." (Emphasis added.)
47 U.S.C. 405

Communications Commission, 91 U.S. App. D.C. 72, 202 F.2d 298, 303-304 (1952).

Additionally, appellant's argument in this regard is wholly fallacious. The total interference picture has traditionally been deemed necessary in order to make a meaningful determination on the comparative need question under Section 73.24(b) of the Commission's Rules. Greenwich Broadcasting Corp., 27 F.C.C. 25 (1959), aff'd sub nom. Greenwich Broadcasting Corp. v. Federal Communications Commission, 111 U.S. App. D.C. 129, 294 F.2d 913 (1961); Russell G. Salter, Inc., 28 F.C.C. 819, 822 (1960); Suburbanaire, Inc., 29 F.C.C. 953 (1960).

Furthermore, the actual incremental interference caused by an applicant cannot be shown absent evidence on the entire situation because all or part of the interference caused by the proposal may be in an area which already receives interference. In fact, such is the case in this proceeding. Part of the WHEO service area which would receive objectionable interference from Central's application already receives interference from Station WMPM. Thus, appellant cannot be heard to claim that the issues as designated did not subsume the evidence in question or that appellant did not have notice of their scope.

Appellant next argues that "time is not of the essence as might be the case in a comparative proceeding since Central was the only applicant in the case" (Br. 19), and that the ends

of justice would only be served by deciding this case on all of the facts. At pages 11-12 of its brief, appellant cites numerous cases which purport to show instances in which records have been reopened and rehearings granted in the interest of "complete consideration." But these cases are inapposite to the situation now before this Court.

For example, in both Enterprise Company v. Federal Communications Commission, 97 U.S. App. D.C. 374, 231 F.2d 708, (1955) cert. denied 351 U.S. 20 (1956), and W.S. Butterfield Theatres v. Federal Communications Commission, 99 U.S. App. D.C. 71, 237 F.2d 552 (1956), this Court ordered the records reopened to receive evidence on new developments which had occurred subsequent to the Commission's decision. However, in cases similar to the present one, where the evidence is not a new development, but rather a request for a second opportunity to offer evidence, this Court has consistently found administrative finality to be in the public interest. Guinan v. Federal Communications Commission, supra; Kidd v. Federal Communications Commission, supra; Valley Telecasting Co., Inc. v. Federal Communications Commission, 118 U.S. App. D.C. 410, 336 F.2d 914 (1964); Springfield Television Broadcasting Corp. v. Federal Communications Commission, 117 U.S. App. D.C. 214, 328 F.2d 186 (1964). The Commission has also followed this same policy. Hocking Valley Broadcasting Corp., 17 Pike & Fischer, R.R. 294a (1958); Simon Geller, 25 Pike & Fischer, R.R. 325 (1963); La Fiesta Broadcasting Co., 2 F.C.C. 2d 255 (1965).

In an early case, this Court stated:

"We cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." Colorado Radio Corp. v. Federal Communications Commission, 73 U.S. App. D.C. 225, 227, 118 F.2d 24, 26 (1941).

We submit that this proceeding is precisely the kind of situation referred to above.

B. The Commission Properly Relied on Central's Engineering Evidence, Based on the Theoretical Values of Figure M-3 of Its Rules.

In its "Petition to the Commission to Move the Court of Appeals For An Order Remanding Proceeding," discussed in our Counter-statement of the Case at pages 8 and 9, supra, Central argued, on the basis of a letter from the Department of Commerce indicating that the Commission's soil conductivity map contains certain inaccuracies (R. 542-543), that it now appears that the soil map is so unreliable that no reliance should have been placed upon it and that the Commission should not have denied its application on the basis of exhibits predicated on values reflected on this map. The Commission properly found that Central's argument did not constitute new information and that no purpose would be served by requesting the Court to enter an order remanding the proceeding for further consideration.

Figure M-3 is a soil conductivity map which delineates the conductivity throughout the United States by general areas of

reasonably uniform conductivity. The Commission's Rules provide that this map can be used to predict contours without actual field intensity measurements being taken. However, the Commission has long recognized and informed applicants that the use of actual field measurements is a more accurate method for plotting contours. For example, Section 73.152 of the Commission's Rules provides as follows:

"In the determination of interference, groundwave field intensity measurements will take precedence over theoretical values . . ."

See also Sections 73.182 (s) and 73.183 (a) to the same effect.

In addition to the expressed preference in the Rules for actual measurements, the Commission has from time to time warned parties that the soil conductivity map is not precise. For example, in its 1939 Standards of Good Engineering Practice Concerning Standard Broadcast Stations, the Commission stated, in reference to Figure M-3, that "[i]n areas of limited size or over a particular path, the conductivity may vary widely from the values given." 4 Fed. Reg. 2862, 2868. This cautionary statement has been issued with every revision of the map and is contained in Section 73.183 (c) of the Rules.

Bearing in mind this background, it becomes clear that the Commission properly rejected as a ground for accepting substitute engineering exhibits, appellant's belated argument as to Figure M-3's unreliability. The Department of Commerce letter relied upon by

appellant presents no new facts; it merely illustrates the Commission's continuing concern for the reliability of its soil conductivity map. Appellant has at all times been on notice as to the limitations of this map. Yet, it chose to submit its evidence via this theoretical value method. At no time during the hearing did Central indicate it disagreed with the soil map or that it was dissatisfied with its own engineering exhibits. Central made no effort to follow the route preferred by the Commission, that is, to base its engineering showing on actual field intensity measurements, until it was confronted with an Initial Decision denying its application. This belated attempt to make a substitute showing must be rejected.

In summary, the Commission permits either of two methods to be used to prove the extent of interference, actual field intensity measurements or theoretical values. The latter method, with its known limitations, is acceptable where actual measurements are not available. Appellant, knowing this, chose to use theoretical values. The Commission was not unreasonable in accepting its evidence as probative.

II. THE COMMISSION DID NOT RELY ON THE "10% RULE"
AS A PREDICATE FOR ITS DENIAL OF CENTRAL'S
APPLICATION.

Contrary to appellant's vigorous assertion (Br. 13-18), the Commission did not apply the "10% rule" (Section 73.28(d) (3) of its Rules, 47 C.F.R. 73.28(d) (3)) to Central's application. Thus, the question raised by appellant on this appeal as to whether the Commission erred in applying that rule to this case is rendered moot.

In discussing the total interference which would be caused to Station WHEO, the Commission stated that "[t]he cumulative interference to WHEO of 11.8% would result in the service of that operation's [sic] being reduced to an unsatisfactory degree" (R. 522). This was the Commission's finding. Appellant bases its argument, however, on the following footnote to such finding, which read:

"If the situation were reversed, and if WHEO were applying for a new station which would receive interference to 11.8% of the population within its normally protected contour, the proposal would be deemed so inefficient that it would violate the Commission's 10% rule . . ."

Mention of the 10% rule appears only in this footnote. No reliance was placed upon it as a legal ground for decision. Rather, it was merely cited as an example of how loss of service to 11.8% of the persons residing within a new station's normally protected contour could result in such proposal being considered to be an inefficient operation. To repeat, the decision itself in no wise rested on this proposition.

A strikingly similar situation was presented in WMAX, Inc., 29 F.C.C. 706, reconsideration denied, 30 F.C.C. 104, aff'd sub nom. Atlas Broadcasting Co. v. Federal Communications Commission, 111 U.S. App. D.C. 196, 295 F.2d 183 (1961). The Examiner had stated in a footnote to her Initial Decision, 29 F.C.C. 709, 713, that the 10% rule was an example of the use of percentage relationships in finding a proposal to be inefficient. The Commission expressly rejected the argument made to it that the Examiner had thus relied on the 10% rule to decide the Section 73.24(b) issue. 29 F.C.C. at 707.

Likewise, it is submitted here that the Commission did not rely on the 10% rule to decide the Section 73.24(b) issue in this case.

III. THE COMMISSION'S DENIAL OF CENTRAL'S APPLICATION WAS A REASONABLE EXERCISE OF ITS DISCRETION.

Appellant urges (Br. 18-21) that even on the basis of the evidence of record, the Commission should have granted its application. It states that a comparison of the large number of persons who would gain a new primary service from its proposal with the small number of persons residing in the area which would lose service by virtue of Central's grant, dictates the conclusion that Central's application proposes an efficient use of its frequency and therefore should be granted. Appellant further asserts that "[t]he significant factor in this proceeding

is not, as the Commission erroneously contends the relative concept of percentages, but rather as clearly set forth in the issues the absolute concept of the numbers of persons and square miles which would gain or lose service as a result of the proposal" (Br. 19).

This contention simply is not correct. Both percentages and absolute numbers are clearly relevant in any discussion of efficiency. However, the primary consideration in a Section 73.24(b) case is the question of comparative need, i.e., whether the need for the service to be gained outweighs the need for the service to be lost. WMAX, Inc., supra; Newport Broadcasting Co., 13 Pike & Fischer, R.R. 228, reconsideration denied, 13 Pike & Fischer, R.R. 236c (1956). Here, there has been no showing that the gain area needs appellant's proposed service. On the contrary, the facts do not leave much doubt but that appellant's proposal is geared primarily to cover the city of Charlotte. This city of 209,551 persons now has eight standard broadcast stations assigned to it. The record contains no evidence as to any need for appellant's proposal in Charlotte. The remainder of the gain area is equally well served.

Given these facts, it is almost unnecessary to look at the other side of the scale, the need for the service to be lost. Two small market stations would suffer erosion to their normally-protected contours, a result to be avoided unless there is a counterbalancing need. The interference to one of these stations, WHEO, creates a serious cumulative interference picture. Additionally,

the area of interference to the latter station is located significantly closer to WHEO than to Central's station.

The Commission, in its discretion, found that the Section 73.24(b) balance was weighted against the appellant. It cannot be said that this result was either arbitrary or capricious. Thus, we submit, the Commission's decision should be affirmed. Atlas Broadcasting Co. v. Federal Communications Commission, supra; Kidd v. Federal Communications Commission, supra.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the actions of the Commission under review should be affirmed.

Respectfully submitted,

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